



ReSPA

Regional School
of Public Administration

Comparative study

LEGAL REMEDIES IN ADMINISTRATIVE PROCEDURES IN WESTERN BALKANS

ReSPA Activities are
funded by the EU





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Legal Remedies in Administrative Procedures in Western Balkans

Prepared and written
by the Institute of Public Administration, Zagreb, Croatia
for
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Table of Content

FOREWORD.....	7
INTRODUCTION.....	9
1. FRAMEWORK OF GAPA CHANGES AND TRENDS.....	15
1.1. Albania.....	15
1.2. Bosnia and Herzegovina	22
1.3. Kosovo*	32
1.4. Macedonia.....	37
1.5. Montenegro	42
1.6. Serbia	48
1.7. Comparative Overview: Austria, Slovenia, and Croatia.....	53
1.7.1. Austria	53
1.7.2. Slovenia	57
1.7.3. Croatia.....	62
1.8. Conclusions and Recommendations.....	65
2. DEVELOPMENT OF LEGAL REMEDIES SYSTEM BY LGAP – TRADITIONAL AND NEW.....	69
2.1. Albania.....	69
2.2. Bosnia and Herzegovina	75
2.3. Kosovo*	81
2.4. Macedonia.....	86
2.5. Montenegro	89
2.6. Serbia	93
2.7. Comparative Overview: Austria, Slovenia, Croatia	96
2.7.1. Austria	96
2.7.2. Slovenia	100

2.7.3. Croatia.....	105
2.8. Conclusions and Recommendations.....	108
3. EX OFFICIO INTERVENTIONS.....	111
3.1. Albania.....	111
3.2. Bosnia and Herzegovina	113
3.3. Kosovo*	116
3.4. Macedonia.....	119
3.5. Montenegro	120
3.6. Serbia	122
3.7. Comparative Overview: Austria, Slovenia, Croatia	127
3.7.1. Austria	127
3.7.2. Slovenia	128
3.7.3. Croatia.....	130
3.8. Conclusions and Recommendations.....	131
4. ALTERNATIVE DISPUTE RESOLUTION	133
4.1. Albania.....	133
4.2. Bosnia and Herzegovina	135
4.3. Kosovo*	136
4.4. Macedonia.....	138
4.5. Montenegro	139
4.6. Serbia	140
4.7. Comparative Overview: Austria, Slovenia, Croatia	141
4.7.1. Austria	141
4.7.2. Slovenia	143
4.7.3. Croatia.....	144
4.8. Conclusions and Recommendations.....	145
5. FINAL CONCLUSIONS AND RECOMMENDATIONS	149
5.1. Country Specific Conclusions and Recommendations.....	149
5.1.1. Albania	149

5.1.2.	Bosnia and Herzegovina	151
5.1.3.	Kosovo*.....	152
5.1.4.	Macedonia.....	154
5.1.5.	Montenegro.....	155
5.1.6.	Serbia	156
5.2.	Overall Conclusions and Recommendations	157
5.2.1.	Complex Goals of Administrative Procedure Reforms	157
5.2.2.	Continuous Task of Modernization of Administrative Procedures	158
5.2.3.	Europeanization as the Main Reform Trigger	158
5.2.4.	Need for Modernization.....	160
5.2.5.	Prerequisites for Successful Implementation	160
5.2.6.	Obstacles	160
5.2.7.	A Brief Comparative Overview	161
5.2.8.	Lessons Learned.....	161
REFERENCES	.....	163
Legal sources	.....	165
Albania	.....	167
Austria.....	.....	168
Bosnia and Herzegovina.....	.....	169
Croatia.....	.....	171
Kosovo*.....	.....	171
Macedonia .....	.....	172
Montenegro.....	.....	172
Serbia .....	.....	173
Slovenia.....	.....	173
Internet sources.....	.....	174

FOREWORD

Administrative reform is one of the most frequently used terms in contemporary societies. Public administrations have become more and more complex, and are functioning in increasingly complex and dynamic environments. National public administrations are characterised by numerous new tasks, functions, goals, subjects, organizations, and arrangements with other sectors (private, civil, and non-formal). Other sectors are also involved in providing certain public services. Modern public administration consists of state administration, territorial (local and regional) self-government, and public services – which are reconceptualised in the European Union as the services of general interest.

The notion of the European Administrative Space has frequently been used on the basis of a growing body of European administrative standards. One of the sectors in which administrative convergence takes place ever more rapidly is administrative procedure. The EU is making strenuous effort to ensure effective implementation of the right to good administration guaranteed by the Charter of Fundamental Rights, to boost administrative simplification traced by the Service Directive, and to facilitate the realization of many other standards of good administration. One of the newest initiatives is that of codification of the EU administrative procedure law in the form of the Model Rules which would apply to all of the procedures conducted by the EU institutions, bodies, offices, and agencies.

There are equally important developments in the field of administrative procedures especially in South-Eastern Europe. Current reforms of the general administrative procedure acts in South-Eastern Europe can be seen as interplay between the legalistic tradition and political and managerial pressure on the rationalization of public administration. Eighty-year tradition of general administrative procedure in the Region, especially on the territory of the former Yugoslavia, is an obstacle to administrative modernisation, because administrative procedures are frequently used for and abused in various bureaucratic manoeuvres. Although general administrative procedures can ensure better legal protection of citizens if certain conditions are fulfilled, they must not be used for reducing the complexity of administrative tasks to routine legalistic decision-making. The development of administrative justice can add significantly to the improvement of legal protection of citizens and it can simultaneously ensure streamlining, simplification, and acceleration of administrative procedures.

This study was prepared in the autumn of 2015, with subsequent assessments of the newest developments in the Region until the beginning of April 2016. The expert team of the Institute of Public Administration from Zagreb, Croatia was commissioned to prepare the study. The team consisted of researchers who have substantial experience in supporting, monitoring, assessing, and researching administrative modernization efforts in the Region. They are university professors and lecturers, with experience as international experts for administrative modernization and administrative procedural law development, and scientific research of public administration reforms. Other experts and staff of the Institute of Public Administration in Zagreb, as well as the ReSPA staff have supported the preparation of the study.

The expert team collected an impressive amount of information, data, and legislation from six Western Balkan countries and three countries whose experience seems particularly important for the Western Balkans – Austria, Slovenia, and Croatia, all three now the EU member states. Taking into account that legal remedies are the heart of the system of protecting citizens' rights in their relations with public administration bodies, the study presents and analyses the development of administrative procedural law framework, discusses widening the concept of protection of citizens' rights, analyses legal remedies and ex officio interventions into administrative acts, and concludes with alternative dispute resolution mechanisms. Numerous recommendations have been developed from the analysis and presented in the study. The expert team hope that recommendations and lessons learned may significantly contribute to administrative improvements in the Region and beyond.

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INTRODUCTION

There is a long tradition of general administrative procedural law and court control over public administration on the former Yugoslav territory, which is overlapping with the Western Balkans to a significant degree.¹ The main purpose of general administrative procedure is to serve as one of the crucial components of the system of citizens' legal protection. Such a system is a complex and interdependent group of legally regulated institutions that consists of procedural protection within public administration, national and international court control over administrative acts and actions, court protection of constitutional rights (mostly in constitutional courts), ombudsman protection, guarantees of open access to public sector information, protection of human rights and fundamental freedoms (in the European Court of Human Rights in Strasbourg, etc.), and some others.

Procedural guarantees of citizens' position in relationship to state bodies are mainly a product of the 20th century. The first successful codification of administrative procedural rules in Europe was made by Austria in 1925. Several countries followed it, regulating general administrative procedures in a very similar vein. These were Czechoslovakia and Poland in 1928, and the Kingdom of Yugoslavia in 1930. The second Yugoslav General Administrative Procedure Act was adopted during the early socialist period, in 1956. Other European countries codified general administrative procedural rules after World War II or during the past few decades.² Countries in South East Europe codified administrative procedure somewhat late – Bulgaria in 1970 and Greece only in 1999. Romania has been very reluctant to adopt the Code of Administrative Procedure.

The reform of general administrative procedures has been a common issue in the Western Balkans for a while. All the countries on the territory of the former Yugoslavia took over the Yugoslav General Administrative Procedures Act (GAPA), which was a federal law, in the beginning of the 1990s. However, during the 2000s, almost all of them amended their general administrative procedural laws or / and started to prepare new ones.

1 The Western Balkans consists of Albania, Bosnia and Herzegovina, Kosovo*, Macedonia, Montenegro, and Serbia, while the former Yugoslav territory consisted of all of them minus Albania plus Slovenia and Croatia.

2 Hungary in 1957, Spain in 1958, Poland in 1960, Czechoslovakia in 1967, Switzerland in 1968 (federal law), Germany in 1976 (federal law), Denmark in 1986, Sweden in 1986, Italy in 1990, Portugal in 1991, the Netherlands in 1994, etc. (Medvedović, 2003: 415; Rusch, 2009: 8). Even France adopted a new Code in 2015. Among the countries that have not codified general administrative procedure are Belgium, the United Kingdom, Ireland, Romania, etc.

Thus, the modernisation of general administrative procedures by preparing and adopting new acts on general administrative procedure, has been a common activity in the Western Balkans. Some countries adopted new general administrative procedure acts at the end of the 1990s (FR Yugoslavia in 1997, Federation of Bosnia and Herzegovina in 1998, Slovenia in 1999). They were followed by Bosnia and Herzegovina (at the federal level) and the Republic of Srpska (2002), Montenegro (2003), Macedonia (2005), Kosovo* (2007) and Croatia (2009). Albania adopted two acts, in 1999 and in 2015. Montenegro adopted the new Law on General Administrative Procedures in 2014, Macedonia in 2015, and Serbia in 2016. There is the new draft law on general administrative procedures in Kosovo* (2015). As can be seen, the amendments and new laws have been relatively frequent, showing that new rules and institutions have not been fully stabilized yet.

The Yugoslav General Administrative Procedure Act, adopted in 1956, was amended four times, in 1965, 1977, 1978 and 1986, but remained very similar, in its main institutes, to the first version, even to the old Yugoslav GAPA of 1930. The first Yugoslav GAPA followed the then brilliant example of the Austrian GAPA of 1925, the first successful codification of administrative procedural rules in the world. There was only one previous attempt – Spanish Ley Azcárate of 1889 (Ley de Bases sobre el procedimiento Administrativo) can be seen as the first serious attempt in that direction (Ortega, 2010: 297).

Yugoslav GAPA was known as the longest administrative procedural law – it was “the most comprehensive and the most detailed codification in the World”, having not less than 303 articles (Krbek, 2003: 36). It offered fairly good protection of citizens’ rights, especially if the circumstances of the then regime are taken into account. It guaranteed the right to appeal and the right to be heard; offered several other procedural guarantees; established duties of state bodies to find out true facts, to equip an administrative act with written explanation of grounds and to deliver it to the party(ies) concerned, etc. Because of that, general assessment of that piece of legislation is very good.

However, it was casuistic, court-imitated, and too complex, with many possibilities for ministries, state prosecutor’s office, and other central state bodies to intervene in a final administrative act. Because of the underdeveloped administrative justice system, it was possible for administrative practice to neglect certain procedural rules and guarantees and to weaken the protection of citizens. It has to be stressed that the main purpose of the GAPA was to respect the public interest, while the protection

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and ICJ Advisory opinion on the Kosovo Declaration of independence.

of citizens' rights was a second-order goal. At the end, new technologies and new circumstances of democratic societies call for serious consideration of the concept, of all institutes, and of each provision of the GAPA.

Similar legal regulation of administrative procedures during almost eighty years has had a profound effect on the generations of lawyers and civil servants, as well as on citizens. General administrative procedure has become part of the institutional memory and social capital of the countries on the former Yugoslav territory. It is in a way built into everyday life. Nevertheless, it also causes severe rigidity and formalism in practice of administrative bodies.

Almost all of the new GAPAs, with the exception of the two Albanian codes, were based on the old Yugoslav model, and consequently, on the old Austrian tradition, i.e. on the ideas of classical Weberian public administration. It is the newest trend of administrative procedural modernization in the Region, under strong European influence. The new round of the GAPA reform started in the second half of the 2000s and in early 2010s, with Croatia as a forerunner. OECD-Sigma expert support can be credited for fostering real and thorough GAPA modernisation in Montenegro, Macedonia, Albania, Kosovo*, and Serbia. Bosnia and Herzegovina, with its complex competencies with regard to regulation of general administrative procedures, will probably soon join the efforts to modernize and implement standards of good administration. Firmer and broader legal protection of citizens' rights, simplification of administrative procedure, regulation of modern information and communication technology usage in the procedure, and better efficiency of procedures, are among the main goals of current administrative procedural reform efforts in the region.

Administrative procedures have a three-fold purpose. Firstly, administrative procedures influence the realisation of human rights and determine the level of legal protection of citizens' rights. Secondly, they can contribute to the realisation of certain wider societal values, like the rule of law, legality, curbing corruption, raising the level of transparency in public administration, etc. Last but not least, administrative procedures are a substantial part of administrative technology responsible, to a large extent, for (in)efficiency of public administration – too complex and detailed legal regulation of administrative procedures that imitate formal and complex court procedures can significantly add to public administration's inefficiency. Such a complex purpose of administrative procedural law makes legislative changes and changes in administrative practice difficult to achieve – it asks for a systemic approach in drafting a new law and comprehensive measures to upgrade practice.

The main GAPA modernisation issues that have been under consideration in the Western Balkans are:

- Changing the purpose of administrative procedures, from the protection of the state and public interest to the protection of citizens' rights;
- Harmonization with the European Union's *acquis communautaire* and other European law standards;
- Guarantees of proportionality principle;
- Right to access data, files, web pages and information, and protection of personal data;
- Introduction of administrative contracts as a new form of resolving administrative cases;
- Regulating forms of electronic communication between citizens and public administrative bodies within administrative procedures;
- Protecting citizens in cases of the so-called real acts;
- Protecting consumers in their relationships with providers of services of general interest;
- Simplification of procedural steps and fastening general administrative procedures;
- Abandonment, remodelling or simplification of the extraordinary legal remedies;
- Providing for the creation of the points of single contact;
- Stricter regulation of time limits, to improve administrative case management, and consideration of positive fiction of administrative acts in certain types of cases;
- Reconsidering the role of and need for special administrative procedures in particular administrative fields; etc.

Administrative procedures and administrative justice in national settings are the two main pillars of the system of legal protection of citizens' rights, which are very closely connected and interdependent. Changes of general administrative procedures simultaneously enable and call for changes in the administrative justice systems. If court oversight of administrative actions becomes more effective, there is more and more room for designing administrative procedures to become much faster and more efficient in issuing decisions in individual administrative cases (Koprić, 2011). It is widely understood that changes in both components, administrative procedures and administrative justice, have to be thoughtfully planned and coordinated in advance.

According to the traditional model, all public bodies have to apply the principles and provisions of general administrative procedural law, with two-instance proceedings as a result. Ratification of the Convention, the Court judicature, and spreading of the common European model of administrative justice³ are the main reasons for current reforms of administrative justice in many countries. The standards from Article 6 of the European Convention of Human Rights and Fundamental Freedoms (ECHR) require a two-tier system of administrative justice with administrative dispute of full jurisdiction, public hearing, the right to appeal to the higher court, and the protection of issuing administrative decisions within a reasonable time. For now, Slovenia, Croatia, and Macedonia have a two-tier system of administrative justice, at least formally in line with the standards of the Convention (Observatory, 2007).

The focus of this study is modernization of legal remedies in administrative procedures. It is important to stress that the scope of the GAPA defines the subject of legal remedies. In such vein, if GAPA incorporates general administrative acts, administrative contracts and provision of public services, it directly influences the scope, goals, and limits of legal remedies. The study takes into account broadly defined legal remedies, including traditional and new legal remedies, ex officio interventions into the valid administrative acts (which used to be wrongly conceptualized as the so-called extraordinary legal remedies), as well as the possibilities of alternative dispute resolution in administrative procedures. The study concludes with final country-tailored recommendations and overall conclusions.

Since the study is mainly dedicated to analysing legal norms, it can elaborate otherwise necessary implementation of norms or their gaps only to a certain extent. The focus is on the GAPA in each country, with limited references to other systemic procedural laws, especially to the laws on administrative disputes. The problem of special administrative procedures is taken under consideration as well. The approach of the study is not purely legal; it is also interdisciplinary and practical. In this sense, the analysis of organization of public administration, as well as comparative insights on the topic in Austria, Slovenia and Croatia are the most important. Finally, this study offers a set of recommendations as an upgrade of the core subject analyses.

With regard to the GAPA and legal remedies in administrative procedures, there are aspects that make a general framework. Firstly, a law such as the GAPA is at the very core of public administration reform and strategies adopted under this policy; therefore, the GAPA can and should serve as a driving force of Europeanization and modernization of the public sector and society in general. Secondly, individual countries should build their

3 On such a common model see Woehrling (2006), Observatory (2007), and Winkler (2007).

solutions on the EU principles and trends (with the European Parliament Resolution of LAP of the EU of January 2013 onwards), with due account of the efficient implementation of *acquis communautaire*. Consequently, an adequate regulatory framework and capacities are to be established based on the experiences of the EU and its Member States while respecting national traditions and the characteristics of individual countries. Specifically, it requires efforts to take stock in relation to what the EU has done so far and what the countries have achieved (or not) so far. Thirdly, there is a clear connection between administrative legal remedies and administrative judicial review of administrative acts. The broader the latter, the more limited is the GAPA in allowing contestability within administrative procedure and vice versa. Against these circumstances, it is safe to say that there is a need to re-think the individual countries and region's approach towards GAPA reform in the Western Balkans and to develop new tools that have the capacity to advance efficient public policies but simultaneously guarantee basic rights versus public administration to parties in administrative procedures.

1. FRAMEWORK OF GAPA CHANGES AND TRENDS

- A) Current changes and trends in reforming administrative procedures and their reflection on legal remedies in the respective countries – history, motives and triggers, goals, effects and main institutes tackled; including
- B) relationship between GAPA and special procedural laws (focus on *lex generalis v. lex specialis* notion and European and constitutional protection of equal rights), and
- C) main characteristics of public administration and judicial review structure, namely the organization of public law bodies engaged in administrative procedures and the organization of administrative justice systems (basic information on state administrative bodies, local governments, public institutions, other bodies issuing administrative acts – in all instances and organization of administrative justice).

1.1. Albania

(A) Albania has strived for Europeanization since 1992 (signed Trade and Co-operation Agreement with the EU and PHARE funding initiation). Its efforts intensified after 2003, when it was acknowledged as a potential EU candidate, and after 2006 when it signed and ratified the Stabilisation and Association Agreement. Most recent progress was made in 2009, when it signed an Association Agreement with the EU, followed by Albanian application for EU membership in the same year. After several progress reports and assistance projects within CARDS and by SIGMA (specially on the GAPA) and Venice Commission (on judiciary, with particular emphasis on civil and criminal proceedings) Albania, was granted the candidate status in June 2014 based on the Commission's recommendation of October 2012 regarding completion of key measures in the areas of judicial and public administration.

Among other bodies, there are the state minister of public administration and innovation, the Department of Public Administration and the Ministry of Justice, all acting in the field of public administration reform, including modernization of administrative procedure. In the European Council's conclusion of 24 June 2014, explicit emphasis is put on ensuring a sustained, comprehensive,

and inclusive implementation of key priorities, notably “the reform of public administration and judiciary” followed by “strengthening independence, transparency and accountability of the judiciary” and “providing greater legal certainty for economic operators”. In general, measures related to the rule of law should be strengthened, especially in public administration and the judiciary, aiming at their professionalism and depoliticisation, efficiency and accountability. Drafting of the new CAP was encouraged in line with EU standards of autumn 2014, and it was adopted in spring 2015. It will enter into force one year after publication. The EU authorities and related organizations have put additional stress on the regulation of special procedures in tax collection (in particular VAT) and protection of competition.

Regarding administrative decision-making, the most important law is the Code of Administrative Procedure (CAP). The first CAP was adopted in May 1999 (No. 8485; CAP 1999) and it had 154 articles. Prior to that Albania had had no GAPA, only individual provisions in sectoral laws and no fundamental principles had been guaranteed. Albania lacks GAPA tradition similar to that of the former Yugoslav or other CEE countries influenced by Austria. Albania was a part of the Ottoman Empire for five centuries and consequently subject to Turkish law until 1912. Moreover, there was a tension between the procedural regimes of the communist period (1944–1992). The state overpowered citizens, internal review of potential complaints was more important than external (judicial) control, and democratic state governed by the rule of law was non-existent (OECD, 1997: 130–133).

The CAP of 1999 identified the range of administrative organs and bodies subject to it, the meaning of administrative actions, and general principles to be respected in administrative processes. It provided for necessary steps during the initiation, investigation, and finalisation of a decision-making process. The CAP of 1999 defined twelve basic principles (Art. 9–20): lawfulness, protection of public interest and private subjects’ rights, equality and proportionality, justice and impartiality, co-operation of public administration with private persons, responsibility, decision-making, efficiency and debureaucratisation, free provision of services, internal and judicial review, protection of state secrets and confidentiality, right to be informed (Taska, in Apelblat, 2011: 15–18).

The new CAP (No. 44/2015), containing one hundred articles, was adopted in 2015. It enters into force in 2016 (CAP 2015). The Law was drafted in 2011 with SIGMA assistance. In addition, certain connected new laws were adopted, such as the new Civil Service Law (2014; replacing the one of 1999), and the laws on organization and functioning of public administration, on the right to information, protection of state secrets and personal data, on ethics in public administration (2003), etc. (Çani, 2012).

All the laws are based on the Constitution of 1998 (following the one of 1991; no. 8417, 21 October 1998). The Constitution has provided for the division of powers, legality principle, addressing public administration (acts) in particular, protection of rights before independent and impartial courts, etc.

Albania regulated judicial control of administrative acts within general judicial reform announced in the beginning of 2014 (special strategy 2014–2020). Administrative judiciary is organised in six administrative courts of first instance (one in Tirana, five regional courts), the second instance is the Administrative Court of Appeal and the supreme Administrative College of the High Court. All these courts were set up in November 2013. However, the Law on Judicial Administration (no. 49/2012) was declared unconstitutional by the Constitutional Court in March 2014 on account of its adoption by simple instead of qualified parliamentary majority (3/5 of all members of the Assembly required, which was not achieved). Hence, a new law on organization and functioning of the administrative courts and adjudication of administrative disputes had to be adopted. Moreover, according to the EC progress report of October 2014, administrative courts still need to be made fully operational.

The CAPs (CAP of 1999 and in particular the CAP of 2015) are based on the principles of legality, due process, and proportionality. General intention of the new laws is to incorporate individual administrative acts, administrative contracts, and other administrative actions within the CAP scope, in order to enhance overall systemic approach, widen court control of public administration, and ensure efficient procedures. Proceedings are grounded on the inquisitorial principle and balanced with guarantees to parties to the procedure, such as access and legal protection, advice and information, obligation to notify about an administrative act and to give written statements of grounds and legal remedy, and resolving administrative silence by a fictitious administrative act (as inspired by Directive 2006/123/EC; Çani, 2014: 151–173). Special emphasis is placed on speeding up the proceedings by introduction of one-stop shops, e-government solutions, etc. Hence, the main principles, arising from the ECtHR judgments, are increased equality of participants in the procedure, abolishment of almost all mandates of administrative bodies over private parties, and effective judicial protection (Meça, 2014: 182–194).

Main novelties in the CAP of 2015 are based on SIGMA's recommendations. The CAP of 1999 did not incorporate non-formal procedure as a rule, and it lacked certain regulation, in particular on full acknowledgment of the rule of law (within discretion explicitly), e-communication, assistance to parties, and administrative contracts. Some amendments were introduced in the 1999 CAP, such as the principle of non-formalism and efficiency, forms of

e-communication, single point of contact, strengthened inquisitorial principle, cooperation in administrative proceedings, etc.

The scope of the 2015 CAP follows the 1999 CAP (Art. 1). In Article 2 it incorporates not only (1) individual administrative acts, but also (2) administrative contracts and (3) public services. Additionally, the principles of the CAP and further provisions of the Code *mutatis mutandis* are applicable to the (4) normative acts of “public or private entities exercising self-regulatory functions in the area of regulated professions, established by law, or being conferred the right to exercise such functions”. All those activities may be conducted by public or private authorities and organizations, and they are covered by the CAP on the basis of functional criterion of public administration. There are 18 basic principles defined, (Art. 4–21) in addition to those from the CAP of 1999, such as transparency and information principles, active assistance, use of language, exercise of discretion, proportionality, fairness and impartiality, equality and objectivity, accountability, etc.

(B) The 2015 CAP does not contain a provision that would regulate the relationship between that law as a general procedural law and special laws that may contain procedural provisions. There was a similar situation with the previous CAP of 1999, which also did not contain an article regulating that relationship.

The 2015 CAP connects the implementation of certain legal institutes with the adoption of special legislation. This is the case with the act of assurance, one-stop shop (Art. 74), and silent consent (Art. 97/1).

Legal definition of an act of assurance is regulated in Art. 3/2/c which states that this act is “... an act, through which the public organ, if this has already been provided by a special law, may, preliminary provide assurance that it will issue or refrain from issuing a certain administrative act at a later date”. Such regulation will probably have a negative effect on implementation of this new institute because every act of assurance has to be provided by a special law.

Art. 74 regulates one-stop shop: “Regarding all the services for which a one stop shop service point has been provided for according to special laws, the provisions of this Code shall apply...” According to such wording, the CAP shall apply only for those one-stop shop points that have been foreseen in special laws.

Art. 97/1 regulates silent consent:

“1. If in the administrative proceeding the party has requested the issuance of a written administrative act, and the public body has failed to notify its decision within the initial time limit, and neither to notify the extension of the time limit, nor a decision within the extended time limit, the request shall be

deemed approved, and the requested written administrative act as issued in silence (hereinafter referred to as “the act in silence”), in the cases this has been provided by special laws.”

The silent consent rule from Art. 97/1 of the 2015 CAP requires that each case be regulated by a special law. The CAP can be applied only if there is explicit authorisation in the special law.

Finally, unlike the other GAPAs in the Region, the Albanian CAP does not make the adoption of special laws a legal precondition for application of some newly introduced legal institutes such as the administrative contract. In this respect, the Albanian CAP is the most advanced piece of legislation because it enables direct application of this institute without adoption of the special law that should serve as key for its unlocking.

The 2015 CAP defines administrative contract in Art. 3/5. Necessary conditions and requirements of administrative contracts are regulated in Art. 120.

“An administrative contract is an agreement which establishes, modifies, or terminates a concrete relationship under public law, and in which at least one of the contracting parties is a public body.” (Art. 3/5)

“1. A public body, in order to fulfil an interest of the public, which it serves, but without affecting the interests or rights of the other parties, may conclude an administrative contract, provided that the following conditions are met:

- a) the contractual form is not explicitly prohibited by law, or does not come against the nature of the administrative case itself; and
- b) the public body is authorized by law to decide on the case with discretion.” (Art. 120)

Regulation of administrative contract in Art. 120/1 follows correct legal reasoning regarding the relationship between the general and special law. It regulates administrative contract in a way that opens door for its application within a wide circle of administrative areas. Administrative contract may be applied directly based on CAP provisions, without adoption of special legislation. However, in order to avoid possible unintended negative consequences of direct application, the legislator has enabled special laws to restrict its application in those areas where contractual form is “explicitly prohibited by law” or where conclusion of such a contract is “against the nature of the administrative case itself”. The latter is left to the future administrative and court practice to determine which concrete administrative matters are not suitable for contractual form.⁴

4 Albanian CAP of 1999 did not have such regulation of administrative contract. Rather, it explicitly proclaimed which contracts should be regarded as administrative contracts. That was regulated by Art. 151/1 and 2 of the 1999 CAP that stated:

Along with previously mentioned situations, the 2015 CAP has created the biggest number of legal possibilities for different regulation of several procedural elements. There are 39 situations in which the CAP explicitly regulates possible different regulation by special law. These are: de-bureaucratisation of procedure (Art. 18/1), costs (20/1, 2), language (21/1), competence (23/1, 27/1), joint participation in the procedure (37/1), capacity for being representative (40/1), responsible unit/official (43/2), authority to sign the act (43/4), deadlines (53/2, 56/1, 91/1, 141/1, 156/1), correction of inaccuracies in the request (62/2), conflict of jurisdiction (70/5), administrative assistance (71/3), issues connected with one-stop shop (75/2, 3), ex-officio investigation (77/3), conclusion of the ex-officio procedure (90/2), conclusion of the procedure (93/2), form and parts of the administrative act (98/1, 99/3), administrative act that does not need reasoning (101/1), abrogation of a lawful act (117/1), various issues connected with the appeal (129/2, 131/1), suspensory effect of the appeal (134/1), body to which the appeal is addressed (135/1), decision on the appeal (138/5), appeal against an omission to act (139/4), effect of the act resolving the appeal (140/2), way of notification (148/2), international notification (153/1), notification (164/3) and execution (167/1). A large number of explicit authorisations to regulate certain elements of administrative procedure differently by special laws may stimulate the mushrooming of laws that would contain procedural rules and depart from the solutions enacted by the 2015 CAP.

(C) The CAP 2015 defines the “public body” as any central state body which performs administrative functions; any public entity organ, to the extent it performs administrative functions; any local government body, which performs administrative functions; any Armed Forces body, as long as they perform administrative functions; as well as any natural person or legal entity which, according to the law, regulations, or any other form provided for by the legislation in force, has been granted the right to exercise public functions.

Pursuant to the Law No. 90/2012 on the Organization and Functioning of State Administration, the state administration of Albania comprises Prime Minister’s Office, ministries, subordinate organizations, organizations providing public services (services of general interest), autonomous agencies, and administrative bodies in prefectures.

Currently, there are 19 ministries, hierarchically on the top of all other state administration bodies. Their internal units consist of the *secretariat of the*

„1. The administrative contract is an agreement by means of which a legal relation of public law is created, modified or terminated.

2. The following are administrative contracts: a) public work undertakings; b) public work procurement; c) public services procurement; c) games of chance licensing; d) continuing supplies contracts; h) contracting for services provided by private subjects in case of natural disasters.“

Ministry, the main directorate, directorates, and sectors. The establishment of special organizational units, *departments*, may be provided by special laws. Additionally, departments can be established as internal units of the Prime Minister's Office, like the already established Department of Public Administration.

Unlike ministries, which mostly deal with policy, subordinate organizations are established by the Government in order to conduct administrative functions requiring a higher level of managerial or professional expertise. Their tasks include direct implementation of law, provision of public services, internal administrative functions, and professional support to the ministry. They are subordinate to one of the ministries or directly to the Prime Minister's Office.

Non-economic public services are provided by organizations established for such purposes by the minister's decree and managed directly by the ministry or its territorial branch offices. Economic public services are provided by public companies, on the basis of concessions or through public-private partnerships. Public services are under an extensive Government's supervision since they are part of the state administration system.

Autonomous agencies are established by law as specific organizations with higher autonomy in comparison with other state administration organizations, high specialization, and partly or completely self-financed. Founded mostly as regulatory organizations, they are supervised by the field minister and exceptionally by the Prime Minister.

Administrative bodies in prefectures conduct the activities of the prefects, who are representatives of the state administration in regions. There is also a large network of state administration branch offices founded on the territory of one or more local units by the ministries or subordinate organizations.

Until two years ago, Albania had a highly fragmented territorial organization consisting of 374 basic local units (communes and municipalities). Amalgamation of local government units was conducted in the course of the 2014 reform. Currently, there are 61 municipalities, which are basic local units, and 12 regions, which are second level local government units. The regions are divided into 36 districts acting as mere administrative units, i.e. the territorial framework for the provision of deconcentrated state and regional services. All local government units have their own administrative apparatus engaged in administrative procedures. Local units often cooperate in order to provide communal public services. For example, there are 55 joint companies in the fields of water supply and waste management. Some of public services are privatized and subject to concessions.

Administrative judiciary is organised in six administrative courts of first instance (one in Tirana, other five regional), the second instance Administrative Court of Appeal and the supreme Administrative College of the High Court. All of these courts were set up in November 2013.

1.2. Bosnia and Herzegovina

(A) After the breakup of Yugoslavia, Bosnia and Herzegovina took over the Yugoslav GAPA of 1956 (in its final version of 1986) as the other former Yugoslav republics did in the beginning of 1990s.⁵ However, the creation of rather specific state organization resulted in adoption of four new (G) APAs.⁶ In the Federation of Bosnia and Herzegovina (FBiH) the first APA was adopted in 1998 and revised a year later (OG of FBiH No. 2/98, 48/99). The APA of the Brčko District (BD) was passed in 2000 and since then it has been amended six times (OG of BD No. 3/00, 5/00, 9/02, 8/03, 8/04, 25/05, 8/07, 10/07, 19/07, 2/08, 36/09, 48/11—consolidated text). In the Republic Srpska (RS) and at the state level (Bosnia and Herzegovina; BiH) the (G) APAs were adopted in 2002 (OG of RS No. 13/02, 87/07, 50/10; OG of BiH No. 29/02, 12/04, 88/07, 93/09, 41/13).

In general, the (G)APAs follow Austrian tradition of administrative procedure and do not completely correspond to the requirements of contemporary public administration such as administrative simplification, e-government, quick and efficient functioning, protection of the ever broader citizens' rights regarding public administration, fair procedure, impartiality and availability, harmonization with the EU concept of services of general interest, the right to good administration, etc. (comp. Koprić, 2006; Rusch, 2009, 2011). After adoption of the new (G)APAs, several revisions related to electronic communication and legal remedies (except in the FBiH APA) have been

5 Decree Law on the Assumption of the General Administrative Procedure Act (OG of R BiH, No. 2/92 from 11 May 1992).

6 According to the Dayton Agreement, Bosnia and Herzegovina has a complex (federal) political and territorial structure consisting of several levels and entities. The country is divided into two entities: the Federation of Bosnia and Herzegovina, and the Republic Srpska. In 2000, the Brčko District was created as a separate, decentralized and autonomous unit of local self-government – it is a district of BiH and in such a vein one of the federal units. The Federation consists of ten cantons and 74 municipalities. The Republic Srpska is divided into 57 municipalities. Besides entities, cantons, and municipalities, there are 12 cities in Bosnia and Herzegovina: Banja Luka, Istočno Sarajevo, Mostar, Sarajevo, Bijeljina, Doboj, Prijedor, Trebinje, Zenica, Bihać, Tuzla, and Široki Brijeg. The territory and government of the cities correspond to the municipalities of the same name, with the exception of the cities of Sarajevo and East Sarajevo, which consist of several municipalities. Cities have their own city government whose competences are in between those of municipalities and cantons (or the entity, in the case of the Republic Srpska).

implemented. Other slight changes have been introduced, but mostly due to practical reasons, i.e. in order to regulate institutes often found in practice (e.g. reconstruction of documents, submission of statements in the official language, etc.). Consequently, the regulation of administrative procedures is still too formalized, detailed and not fully in conformity with the needs of contemporary public administration, European standards, and orientation towards citizens.

All (G)APAs contain a large number of provisions inherited from the previous system (from 277 articles in the RS GAPA to 305 articles in the FBiH APA). The structure and the content of the (G)APAs do not differ substantially.

The (G)APAs define the following 16 to 17 basic principles: scope of application of the (G)APA based on the function criterion of public administration, special procedures, subsidiary application of the (G)APA, lawfulness, protection of citizens' rights and public interest, efficiency, material truth, right of reply, free evaluation of evidence, independent decision-making, right to appeal, final and valid decision principle, economy of procedure, active assistance, use of language and use of the term *body*. Additionally, the BiH APA provides for the principles of access to information and data protection (as of 2013) and principle of publicness. Previously provided principle of transparency was replaced by the broader principle of access to information and data protection due to technical reasons based on the introduction of electronic communication and new regulation on data protection.

Regulation of administrative procedure is related exclusively to individual administrative decision-making, but neither general law-making proceedings nor administrative contracts are regulated by the (G)APAs. There are no provisions on the protection of citizens' rights regarding real acts or provision of services of general interest. There was an attempt to introduce the institutes of administrative contract and complaint in the BiH APA in 2012 (in the pre-draft of the Law on the Amendments of the BiH APA prepared by the BiH Ministry of Justice), but the draft provisions failed to be incorporated into the final text. The same novelties were suggested by the Administrative Decision Making in Bosnia and Herzegovina Quality Improvement Programme prepared within one of the PAR projects led by the PAR Coordinator's Office in BiH in 2010.

In the third part of all (G)APAs seven legal remedies are regulated. Besides the appeal as a regular legal remedy, there are extraordinary legal remedies further subdivided into reopening of a proceeding, on the one hand, and special cases of annulment, repeal, and modification of a decision, on the other. The latter comprise five legal remedies: 1) modification and annulment of a decision related to administrative dispute; 2) annulment and repeal of a decision upon official control; 3) repeal and modification of the final decision

upon consent or request of the party; 4) extraordinary repeal of a decision; and 5) declaring decision null. Additionally, the FBiH APA and the RS GAPA contain an additional extraordinary legal remedy called “the request for protection of legality” which has been removed from the other APAs by revisions thereof.

In 2004, the PAR Coordinator’s Office in BiH was established by the Decision of the Council of Ministers of BiH. Its role is to coordinate PAR activities of the Council of Ministers, entity governments, and government of the BD, in cooperation with the Delegation of the European Commission in BiH. In 2006, the governments at all levels adopted the National Strategy of PAR and its Action Plan 1 prepared by the Coordinator’s Office. A separate chapter of the Strategy and the Action Plan 1 (revised in 2011) was devoted to problems and reform objectives of administrative procedure and decision-making. The following issues were stressed as the key problems of the then (and current) situation:

- a considerable number of special administrative procedures undermined the transparency and predictability of public administration’s actions and decisions,
- deadlines for decisions were rarely respected,
- decisions formally made by heads of institutions slowed down the procedure,
- second-instance authorities were reluctant to decide on the merits which resulted in several referrals between second– and first-instance bodies and slowed down the procedure,
- certain extraordinary legal remedies complicated the administrative decision-making system, especially when rarely used,
- legislation did not provide for the possibility of electronic communication between parties and administrative authorities.

However, no significant reforms have been implemented so far and the system of administrative decision-making in Bosnia and Herzegovina still requires essential changes that will simplify administrative procedures and ensure the functioning of public administration based on the principles of good governance, such as rule of law, predictability, accountability, transparency and openness, efficiency and effectiveness. Furthermore, harmonization with EU standards, as well as the standards of the Council of Europe is a pending task.

The organization of public law bodies engaged in administrative procedures in Bosnia and Herzegovina follows the complex organization of the territorial and political system. Bosnia and Herzegovina as a whole, each entity and the

Brčko District have public law bodies principally applying general legal acts (including regulation on administrative procedure) adopted by the legislator of the unit they belong to.

(B) Just as in all the other countries on the former Yugoslav territory, the existence of special administrative procedures in BiH represents a huge challenge to public administration reform and modernisation. The complexity of state, legal, and institutional system of BiH represents an additional challenge because of the legislative powers of constitutional entities (Federation of BiH, Republic Srpska, and Brčko District).

It seems that special procedures are similar across all three entities of BiH. Although comprehensive and reliable data on this matter do not exist, the PAR Strategy clearly stated that "... a considerable number of special administrative procedures undermine the transparency and predictability of administrative actions and decisions. This poses a significant burden to citizens, and increases the likelihood of arbitrary decisions, and other deviations" (PAR Strategy BiH, 2006: 41).⁷ Legal grounds for the existence of special administrative procedure can be found in all the laws on general administrative procedure in BiH, particularly in the (G)APAs of Bosnia and Herzegovina (BiH), the Federation of BiH (FBiH), the Republic Srpska (RS) and the Brčko District (BD).

The BiH (state level) APA regulates special procedure with two articles in the introductory part of the law. Art. 2 regulates special procedure, while Art. 3 regulates the principle of subsidiarity of APA application in all cases when special laws do not regulate certain procedural issues:

„Particular procedural issues for a specific administrative field may be exceptionally regulated by a special law differently from this law, if it is necessary for different treatment in these matters, but they cannot be contrary to the principles of this law.“
(Art. 2, APA BiH)

„In the administrative areas for which the law prescribes a special procedure, procedure will be carried out according to special law, provided that the provisions of this law shall be applied in all matters which are not regulated by a special law.“
(Art. 3, APA BiH)

The APA of the Federation of BiH (FBiH) contains two articles which regulate special procedures (Art. 2) and the principle of subsidiarity of the APA implementation (Art. 3):

⁷ See at <http://parco.gov.ba/eng/?page=110>

„Particular procedural issues for a specific administrative field may be exceptionally by special federal law regulated differently than they are regulated in this law, if it is necessary for different proceeding in these matters, provided that they cannot be contrary to the principles of this law.“ (Art. 2, APA, FBiH)

„In the administrative areas for which the federal law prescribes a special procedure, procedure will be carried out according to the special law, provided that the provisions of this law shall be applied in all matters that are not regulated by a special law.“ (Art. 3, APA, FBiH)⁸

Unlike the GAPA of the Republic Srpska, the APA of the Federation of BiH stipulates that its provisions could be regulated differently only by legislation adopted at the federal level. This change was introduced with the amendments to the Law of 1999.

GAPA of Republic Srpska also contains two general articles that represent foundations for special administrative procedures. Articles 2 and 3 stipulate general conditions under which special procedures should be used in administrative procedure:

„Particular procedural issues due to the specific nature of administrative matters in certain administrative areas could be in a special law regulated differently than they are regulated by this law, if necessary.“ (Art. 2, GAPA of RS)

„In the administrative areas for which the law prescribes a special procedure, procedure will be carried out according to that law and regulations of that law must be in accordance with the basic principles defined in this law. In all those matters which are not regulated by the special law, procedure will be carried out according to this law.“ (Art. 3, GAPA of RS)⁹

The APA of the Brčko District regulates special procedures in general manner by two articles. Art. 2 regulates special procedure while Art. 3 regulates the principle of subsidiarity in the implementation of the APA:

„Particular procedural issues for a specific administrative field may be exceptionally by a special laws regulated differently than they are regulated in this law, if it is necessary for different treatment in these matters, provided that they cannot be contrary to the principles of this law.“ (Art. 2, APA of the BD)

8 The word *federal* was introduced in the 1999 amendments to the Law (OG of the FBiH 48/99).

9 OG of the Republic Srpska 13/02, 87/07, 50/10)..

„In the administrative areas for which the law prescribes a special procedure, procedure will be carried out by the provisions of that law, provided that the provisions of this law shall be applied in all matters that are not regulated by a special law.“ (Art. 3, APA of the BD)

All these provisions stipulate that a) only particular issues of administrative procedure may be regulated differently from the general regulation, b) these issues should be regulated only by a special law and not by secondary legislation (Government decrees, rulebooks, executive decisions, etc.), c) special regulation is really necessary in a particular administrative area (which should be logically justifiable and reasonable), d) special regulation of particular issues must not be contrary to basic principles of general laws on administrative procedure, and e) general law on administrative procedure is applied only in cases when special legislation does not exist in a particular administrative field (subsidiarity principle).

Apart from these general legal grounds for using special procedure, laws on administrative procedure of all four entities in many instances allow special legislation to regulate specific questions differently from the GAPA. The APA of BiH stipulates some 25 situations in which general procedural law applies “unless otherwise regulated by special laws”. These are legal aid (Art. 34/3), exclusion of official person (38/4), procedural capacity (45/4), reasons for not acting as a representative (47/4), joint action of parties in the procedure (48/1), summoning (62/3, 64/2), delivery (73/2), costs (124), witnesses and duty to witness (167/3), exemption of experts (178/2), decisions taken by the Government (193/3), deadlines (195/5; 208/1, 2; 235; 266/2), different name of the administrative act (197/1), signing the acts of the collegiate body (202/2), jurisdiction for the appeal (215/2, 3; 216), and jurisdiction for administrative enforcement (265/1; 266/3).

The APA of FBiH also contains some 25 specific situations providing for special procedure. These include jurisdiction (Art. 21), official persons (36, 37), legal aid (41/3), exemption of official persons (45/6), capacity to act in administrative procedure (52/4), duty to represent a party (54/4), joint representative (55/1), summoning (69/3; 71/2), delivery (80/2), costs (131), witnesses (185/2), authority to act (200/3), deadlines (202/5; 216/1, 2; 244/1; 275/2, 3), name of the administrative act (204/1), collegiate body (209/2), jurisdiction for the appeal (225/1), and execution (272/2; 274/1, 2).

The GAPA of RS stipulates some 15 situations in which special laws can regulate something differently from the general law and/or when procedural requirements are prescribed by a special law, most often the one regulating civil procedure. These include issues of legal aid (Art. 31), procedural

capacity (41/3), reasons for not acting as a representative (43/4), joint action of parties in the procedure (44/1), summoning (58/3), costs (121), witnesses and the obligation to testify (164/3), experts (175/2), deadlines (192/5; 206/1; 232/1; 262/2), different name of the administrative act (194/1), jurisdiction for the appeal (214/1), jurisdiction for administrative enforcement (261/1).

The APA of Brčko District stipulates some 23 situations in which special laws may regulate differently from the procedural law. These include jurisdiction (21/1), legal aid (28/3), temporary representative (41/3), joint actions by the parties (42/1), electronic signature/documents (53/4; 53a; 285a), summoning (56/3; 58/2); delivery (67/2); costs (104/1; 118), witnesses and duty to testify (161/3), exemption of experts (172/2), jurisdiction to decide in administrative matter (187/2), deadlines (189/5; 203/1; 228/1; 258/1), different name of the administrative act (191/1), and administrative enforcement (255/2; 257/1, 2).

It is obvious that some of the issues explicitly opened for regulation by special laws are those connected with jurisdiction, exemption of official persons, legal aid, summoning, delivery, deadlines, name of the act, function of the collegiate bodies, costs, witnesses, decision on appeal, execution, etc. Such provisions open the door to divergent legal regulation of particular procedural issues. It might be justifiable in some situations when the specificity of certain administrative area requires divergence from general regulation, but in many cases different legal regulation of particular procedural institutes is not needed and creates unnecessary legal complexity.

Several conclusions can be drawn from the analysis of the four BiH GAPAs with regard to special administrative procedure and its relationship to the general administrative procedural law. First, when it comes to the subnational level, two of three laws on administrative procedure do not have the word *general* in their title (APAs of FBiH and BD). Only the GAPA of the Republic Srpska is considered to be law on general administrative procedure. Second, all four laws have almost identical provisions regarding special administrative procedures and subsidiarity of the general administrative procedure law in relation to the special procedure. However, the APA of the FBiH is a bit stricter in comparison to the other three laws, since it reserves possibility to regulate issues of administrative procedure differently from the APA only for federal laws. Third, all four laws restrict special regulation only to certain issues of administrative procedure. Fourth, explicit situations where possibility for special regulation of some procedural issues is stipulated in the GAPA is similar in all four laws, which brings us to the conclusion that the level of GAPA harmonisation on the territory of BiH is quite high. Fifth, it is not possible to establish the exact and accurate data on the actual number of laws which contain procedural articles that may be applied in particular administrative

fields. It can only be assumed that there are several categories of such laws, ranging from those that contain only a few procedural provisions to those that regulate administrative procedure in special administrative fields in a more complete manner. Therefore, one can conclude that when it comes to relationship of general and special administrative laws, the situation is more or less similar in almost all the countries on the former Yugoslav territory.

(C) The bodies of BiH applying the BiH APA are the administrative bodies of BiH when deciding in administrative issues under the jurisdiction of the institutions of BiH and legal entities vested with public authority applying administrative procedure rules (Article 1 of the BiH APA). Pursuant to the Law on Administration (OG of BiH No. 32/02, 102/09) the administrative bodies of BiH dealing with administrative affairs are ministries and administrative organizations affiliated to ministries, independent administrative organizations and other organizations established by law or authorized to perform administrative competences by special law. Besides them, administrative competences might be carried out by institutions, companies and other legal entities vested with public authority. There are nine ministries of BiH and 25 independent administrative organizations established by the Law on Ministries and other Administrative Bodies of Bosnia and Herzegovina (OG No. 5/03, 42/03, 26/04, 42/04, 45/06, 88/07, 35/09, 103/09).

The following bodies are subject to the FBiH APA: the bodies of FBiH administration and the bodies of cantonal administration, city and municipal administrative bodies, and other bodies when directly applying legal regulation, deciding on the rights, duties and legal interests of citizens, legal entities and other subjects in administrative issues. Since the functional criterion of public administration is applied, companies, institutions, and other legal entities vested with public authority by law or regulation passed by the city or municipal council are obliged to apply the APA when deciding in administrative issues (Art. 1 of the FBiH APA).

The organization of administrative bodies at all territorial levels in the FBiH (federal, cantonal and municipal/city) is regulated by the Law on Organization of the Bodies of Administration in the FBiH (OG of FBiH No. 35/05; LOBA). The main two categories are the bodies of administration and administrative organizations. The former are established at all levels of government as federal bodies of administration, cantonal bodies of administration, and municipal/city bodies of administration (Art. 32 of the LOBA). The latter are established when professional and scientific work methods are required, at the federal and cantonal level, but exceptionally also in the cities and municipalities having at least 50,000 inhabitants (Art. 34 of the LOBA).

Federal bodies of administration are federal ministries and federal administrations (independent or affiliated to federal ministries) (Art. 38 and 39 of the LOBA). There are 16 federal ministries and three independent federal administrations (e.g. Federal Administration for Inspection) established in the FBiH. Federal administrative organizations are federal offices (*zavodi*), federal directorates (*direkcije*) and federal agencies (*agencije*) (Art. 40 of the LOBA). There are six organizations of this type currently in the FBiH (e.g. Federal Office for Statistics).

The Federation consists of ten cantons as the third level and 74 municipalities as the lowest level of territorial organization performing their competences by virtue of local administrative organizations. Six out of 12 cities are located in the FBiH.

Cantonal bodies of administration are cantonal ministries and cantonal administrations. In total, there are 96 cantonal ministries (between eight and 13 ministries per canton) and 28 independent cantonal administrations. As many as 39 cantonal administrative organizations have been established in the form of cantonal offices, directorates, and agencies. Additionally, there are 21 bodies established as funds, services, archives, etc.

Municipal and city bodies of administration are municipal and city services for administration. Administrative organizations are established in cities and only exceptionally in municipalities as municipal/city offices, directorates and agencies (Art. 49 and 50 of the LOBA).

The subjects applying law on administrative procedure in the Republic Srpska are bodies of the RS, city and municipal bodies when performing state administration affairs, corporations, institutions and other organizations vested with public authority when deciding on rights, obligations, or legal interests of individuals, legal entities or other parties, or performing other affairs stipulated by law.

Pursuant to the Law on Republic Administration (OG of RS No. 118/08, 24/12, 121/12) the bodies of administration of the RS are ministries, republic administrations, and republic administrative organizations (Art. 12). All these, namely 16 ministries, six republic administrations, and 19 republic administrative organizations, have been established by the same law (Art. 15, 32 and 39). The majority of republic administrations (five) and republic administrative organizations (17) are affiliated to ministries.

Local self-government in the Republic Srpska is organized in 57 municipalities. There are also six cities as a separate category.

The bodies obliged to apply the BD APA are the Departments of the BD Government and other bodies when directly applying legal regulation, in

administrative issues deciding on the rights, duties, and legal interests of citizens, legal entities and other subjects as well as corporations, institutions and other legal entities vested with public authority when deciding in administrative issues (Art. 1 of the BD APA).

Pursuant to the Law on Public Administration of the Brčko District (OG of BD No. 19/07, 2/08, 43/08, 9/13) public administration of the BD consists of Departments of the BD Government, Mayor's Office, Directorate for Finances, Office for the Management of Public Assets, Office of the BD Coordinator at the BiH Government and other administrative bodies (Art. 2). Currently, there are 11 Departments of the BD Government.

Organization of administrative justice in Bosnia and Herzegovina also follows its complex territorial organization. Therefore, it is regulated by the Law on the Court of BiH and relevant laws on the courts in BiH entities and the BD.¹⁰ Judicial review is the competence of regular courts – separate administrative courts do not exist. All administrative disputes are single-instance court proceedings with the exception of BD. The right to appeal in administrative dispute is explicitly excluded in the Law on Administrative Disputes of the FBiH (OG of FBiH No. 9/05, FBiH LAD, Art. 40); the Law on Administrative Dispute of the RS (OG of RS No. 109/05, RS LAD, Art. 34) provides for the right to appeal only if so prescribed by special laws; and the Law on Administrative Disputes of BiH (OG of BiH No. 19/02, 88/07, 83/08, 74/10, BiH LAD) has no special provisions on the right to appeal.

The Administrative Department of the Court of Bosnia and Herzegovina is authorized to decide on lawsuits against administrative acts passed by the bodies of BiH (state level) (Art. 8 of the Law on the Court of BiH). The Appeal Department of the Court decides on legal remedies against the first-instance decisions in administrative dispute (Art. 9 of the Law on the Court of BiH).

Administrative disputes in the FBiH are settled by the cantonal court authorized according to the seat of the body engaged in administrative procedure or its organizational unit (Art. 28 of the Law on the Courts of the FBiH). The appeal against the cantonal court's decision is not possible, but the party is allowed to submit extraordinary legal remedy to the Supreme Court of the Federation or to the cantonal court (depending on the jurisdiction determined by law) (Art. 40 and 41 of the FBiH LAD).

The administrative justice system in the RS is very similar to one of the FBiH. District court (*okružni sud*) is authorized to settle administrative disputes in the

10 Law on the Court of BiH (OG of BiH No. 29/00, 15/02 – other law, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04, 32/07, 49/09 – consolidated text, 97/09), Law on the Courts of the RS (OG of RS No. 37/12), Law on the Courts in the FBiH (OG of FBiH No. 38/05, 22/06, 63/10, 72/10, 7/13, 52/14), Law on the Courts of the BD (OG of BD No. 19/07, 20/07, 39/09, 31/11).

first instance (Art. 31 of the Law on the Courts of the RS) and extraordinary remedies can be submitted to the Supreme Court of the RS or to district courts (depending on the type of legal remedy) (Art. 35 of the RS LAD).

In the BD, principal court is authorized to settle administrative disputes in the first instance and the Court of Appeal acts after the appeal against the decision passed by the principal court. Pursuant to the BD Law on Administrative Disputes (OG of BD No. 4/00, 01/01) the proceedings upon legal remedies are regulated by the Law on Civil Procedure (with an exception regarding the revision).

1.3. Kosovo*

(A) Reform of public administration in Kosovo* was connected with the development of institutional framework during the preparation for and after proclamation of independence from Serbia. Although it was a part of the former Yugoslavia, during the 1990s and 2000s Kosovo* departed from its administrative tradition. That happened as a result of declaration of independence and separation from the Republic of Serbia in 2008.

Kosovo* adopted its first Law on General Administrative Procedure in 2005 (Law No. 02/L–28 of July 2005). The 2005 LGAP has 143 articles systematized into five main parts. Part I (Art. 1–10) regulates definitions and general principles, Part II (Art. 11–28) regulates administrative competences, Part III (Art. 29–34) is titled Procedure to guarantee impartiality of public administration, Part IV (Art. 35–81) is devoted to administrative procedure, Part V (Art. 82–140) to administrative activities. The final section (Art. 141–143) contains transitory and final provisions.

Several assessments of the 2005 LGAP have been carried out under the auspices of SIGMA. Special assessment was done in 2012 and it proposed drafting a completely new law instead of adopting amendments to the 2005 LGAP (SIGMA, 2012: 5).¹¹

11 „The text of the current LAP of 2005 reflects, in general, the intention of the legislator to provide the legal framework for a good system of administrative procedures. In particular the intention to implement the rule of law is recognisable without doubt. However, the good intention has not been translated into an appropriate piece of legislation. The current LAP suffers serious shortcomings that can hardly be eliminated by producing selective amendments of the current legal text. Instead, drafting a new Law is recommended.“ (SIGMA, 2012: 5). „It would be more than difficult to enhance the current LAP by selective amendments. The drawbacks the Law presents are enormous and systemic. Indeed, as far as the regulatory content of individual provisions is concerned, amendments would be possible. However, the overall legislative approach, the confusing structure, as well as the regulatory loopholes would require so many deep alterations of the current text that, in the

The PA assessment prepared by SIGMA in 2014 listed the main shortcomings of the 2005 LGAP:

- The scope of the Law is too narrow as it concentrates on individual administrative acts, leaving other forms of administrative activities unregulated or insufficiently regulated;
- The Law remains fragmented. Essential issues are either formulated wrongly, e.g. administrative discretion, or missing, e.g. the requirement for prompt and timely administrative action;
- Simplification tools are either missing or poorly regulated, for example the use of Information Technology tools;
- Principles to guarantee participation of individuals and citizen orientation are underdeveloped, e.g. access to files, active assistance of parties. There are some general rules on decision-making that might affect an indeterminate or a large number of people, but the regulation remains fragmented;
- The principles of good legal drafting are not applied; for example, the text is neither logically structured nor formulated in a simple and clear manner (SIGMA, 2014: 6).

SIGMA assessment of the Kosovo* public administration concluded its 2014 report with the statement: “The LAP is in place, but it is neither coherent nor complete, and its shortcomings limit its effectiveness in promoting the European principles of good administration” (SIGMA, 2014: 6). These are probably the main reasons why Kosovo* drafted a new LGAP with the support of SIGMA and international experts. That support culminated with the new Draft LGAP of 2015.

The Draft LGAP of 2015 has 162 articles organised in nine parts. Part I – general provisions (Art. 1–13), Part II – subjects of administrative action (Art. 14–43), Part III – administrative actions (Art. 44–70), Part IV – general rules of administrative procedure (Art. 71–82), Part V – course of proceedings (Art. 83–107), Part VI – notification (Art. 108–123), Part VII – administrative remedies (Art. 124–142), Part VIII – enforcement of administrative act (Art. 143–156), and Part IX – final and transitory provisions (Art. 157–162).

The 2015 Draft is entitled Law on General Administrative Procedure, which indicates the intention of its implementation in various administrative fields. The 2005 LGAP, which is still in force, has not managed to position itself as a truly general procedural law, a central procedural public administration’s tool in the legal system. Some special laws refer to it while others regulate

end, all efforts of repairing the Law would entail an imperfect and illegible patchwork rather than a good, consistent, and comprehensible piece of legislation. Therefore, it is proposed to draft and adopt a new LAP for Kosovo*.” (SIGMA, 2012: 6).

the same issues, making unnecessary deviations from its institutes. The 2015 Draft LGAP attempts to position itself as a truly general procedural law of public administrative bodies in Kosovo*.

Furthermore, the Draft Law widens the scope of application of administrative procedure not only to classical administrative unilateral acts (decisions on individual rights, obligations and legal interests) but to the other activities in which public administrative bodies exercise their authority. These include conclusion of administrative contracts and any other activity in which public administrative bodies “exercise their competences through other administrative actions in relation to any person’s rights, obligations, or legitimate interests” (Art. 1.3.). The Law also applies to the situations in which public authorisation is exercised by public as well as private (natural or legal) persons when they decide in administrative matters.

The main principles proclaimed in the 2015 Draft LGAP are those of lawfulness (Art. 4), proportionality (Art. 5), equality and non-discrimination (Art. 6), objectivity and partiality (Art. 7), legitimate and reasonable expectations (Art. 8), open administration (Art. 9), de-bureaucratisation and efficiency of administrative proceeding (Art. 10), information and active assistance (Art. 11), procedure costs (Art. 12), and the right to legal remedies (Art. 13).

Certain principles can be found only in some LGAPs in the WB region (e.g. in Albanian LGAP). For example, the principle of de-bureaucratisation, according to which “an administrative proceeding shall not be tied to specific form unless otherwise provided by law” (Art. 9); gratuity of the procedure, which says that for the party “administrative proceedings are free, unless otherwise provided by law”, and if the payment is stipulated by law, “it shall not be higher than the necessary average cost for carrying out that type of proceeding” (Art. 12/1, 2).

If compared to the other LGAPs in the Region (except four LGAPs in BiH and Slovenian LGAP), the Kosovo* LGAP mainly follows the structure of other laws drafted and adopted in the past few years. However, the 2015 Draft regulates some of the new institutes in more detail than other laws. This is particularly the case with the regulation of administrative contract which is more developed than in majority of the WB countries. The Draft contains provisions about administrative contract organized in eight articles (Art. 60–68) regulating various legal situations. Despite that, application of the institute is completely dependent on the adoption of special laws that have to create legal foundations for the life of administrative contract in practice.

(B) When it comes to special administrative procedures in Kosovo*, the Draft LGAP of 2015 stipulates that: “Special laws may provide special rules

for certain aspects of specific administrative proceedings. Such provisions must comply with the general principles of this law, and cannot lower the level of protection of rights and legal interests of parties as granted by this Law.” (Art. 2/4)

The lawmakers’ intention was to ensure instruments to reduce the number of special laws containing divergent procedural norms. It is stipulated that a) special procedural rules are regulated only by law and not by secondary legislation, b) only certain aspects of administrative procedure can be regulated differently and not the majority of the procedure nor procedure as a whole, c) special procedural rules must be in compliance with the general procedural law, and d) the level of protection of rights and legal interests of the parties cannot be lower than the standards established by the general law regulating administrative procedure.

The Draft LGAP explicitly mentions special laws 14 times. Issues that are explicitly mentioned as something that could be regulated differently by special legislation are those referring to official person (Art. 26/2), joint decision by several administrative authorities (Art. 32/5), relationship within a collegiate body (Art. 37/2, 39/2), administrative contract (Art. 60/2), deadlines (Art. 98/2), specific regulation of various issues connected with electronic documents and electronic signature (Art. 47/3, 4; 61/2; 73/3; 106/5) and electronic notification (Art. 118/1, 2, 3). In comparison with the administrative procedural laws that are closer to the former Yugoslav concept of administrative procedure (e.g. laws in BiH), this law stipulates fewer cases explicitly allowing different regulation by special laws.

Despite the fact that intention of the lawmaker was to reduce the number of special procedures, it remains open how this could be done in practice. The Draft Law, just as almost none of the other analysed laws in the Region, has no instruments to achieve this legitimate goal. The only possible exception is the new Montenegrin APA. There is no obligation of the law drafting office to control whether special laws comply with the provisions of Article 2/4. Furthermore, there is no obligation to assess current situation and to clearly establish how many special laws exist and whether they are in compliance with the requirements of Article 2/4 of the LGAP. Such obligations should have been regulated and placed in the final and transitory provisions.

Similar to regulation in other WB countries that adopted new LGAPs, implementation of certain new institutes has been closely connected with the adoption of special laws. These institutes cannot be applied without such laws. The most important case is regulation of administrative contract in Art. 60/2: “A public organ may conclude an administrative contract, in pursuit of

a public interest and without infringing the rights of a third party in the cases explicitly provided by law.”

Such regulation stimulates adoption of special laws which have to stipulate that a contract is an administrative contract in order to apply the procedure regulated in the LGAP. It requires strong political and administrative support in line ministries that prepare and draft laws in various administrative areas.

(C) Provisions of the LGAP are implemented by all bodies of public administration in Kosovo* defined as central public administration bodies and other subordinate bodies, and local public administration bodies and their subordinate bodies, when exercising public authority and deciding on administrative issues (Art. 1 and 2 of the LGAP, OG of the Republic of Kosovo* No. 8/07).¹²

According to the Law on State Administration (OG of RK No. 82/10) there are four types of state administration bodies: 1) highest state administration authorities – the Government, the Office of Prime Minister, and ministries; 2) central state administration bodies (CSAB) comprise subordinate bodies of state administration performing non-ministerial tasks or other administrative tasks; 3) local state administration bodies (LSAB) are municipal bodies of state administration; and 4) independent state administration bodies (ISAB) consist of legal entities established to perform the tasks of state administration for which the public interest requires a high degree of independence.

Currently, there are 19 ministries, 68 CSABs and a network of LSABs. Since there is no clear policy on deconcentration of state administration, each central body may create its own network of deconcentrated LSABs which function on the territory of one or more municipalities. In addition, there are more than 30 regulatory agencies and other independent bodies, established by the Constitution or by special laws.

Municipalities are the basic territorial units of local self-government in Kosovo*. Currently, the overall territory is divided into 38 municipalities. According to the Law on Local Self-Government (OG of RK No. 28/08; LLSG) they perform three types of competences: 1) competencies vested upon municipalities by the Constitution or laws for which they are fully responsible in accordance with the law and insofar as they concern the local interest

12 The LGAP is also implemented by natural and legal persons who by law, by-laws, or contracts have been vested with the power to exercise duties and competences of public importance. General principles of the LGAP also apply to the activities of natural and legal persons when such activities affect the public interest, but they do not apply to a) administrative acts of regulatory character, b) administrative acts pertaining the internal organization of public administration bodies, and c) administrative acts issued by public administration bodies within private transactions, to which public administration is a party. Indicated expressions are evaluated by SIGMA as too broad, indeterminate, and even contradictory as recommended to be changed.

(own competences), 2) competences of the central government and other central institutions whose execution is temporarily assigned to municipalities by law (delegated competences), and 3) competencies vested upon a municipality or a number of municipalities by law (enhanced competencies) (Article 16). The latter are performed in certain municipalities, where the Serbs are in a majority, and relate to specific fields such as higher education, culture, and secondary healthcare. Municipal administration is organized into directorates, each managed by a director appointed by the mayor (Art. 66).

Services of general interest at the national and local levels are delivered either by numerous institutions and companies under the authority of the state or municipality, or by private service providers.

The reform of administrative justice in Kosovo* took place in 2013 when the new Law on Courts (OG of RK No. 79/10, 37/12, 17/15) entered into force. Until then, Kosovo* Supreme Court had been the only instance authorized to settle administrative disputes. Accordingly, the possibility of filing an appeal had been limited. The only possibility was to require an extraordinary review of the decision passed by the Supreme Court which was conducted by the same court. Since the right to appeal had not been guaranteed by such institutional structure, the reform was primarily based on the introduction of new legal remedies. Three court instances were set up, but no separate administrative court system was established. The Administrative Law Department of the Pristina Basic Court is authorized to settle all first-instance administrative disputes in Kosovo*. The Court of Appeals acts as the second instance court deciding on all appeals submitted against decisions passed by the Basic Court. The Supreme Court deals with extraordinary legal remedies. In spite of the reforms implemented, the small number of judges and consequent huge backlog of cases still impede efficient functioning of the administrative justice in Kosovo*.

1.4. Macedonia

(A) Macedonia started to modernise its administrative procedure in 2005. The Stabilization and Association Agreement with the EU was signed in 2001 and public administration reform was its constituent part. In 2005, the new Law on General Administrative Procedure (LGAP) was adopted (Official Gazette No. 38/05). In the same year, Macedonia was granted the candidate status.

The LGAP was rather detailed, containing 302 articles. It followed the traditions of the Yugoslav LGAP and in fact resembled the old Yugoslav law.

It was amended twice, in 2008 and in 2011 (OG No. 110/08, 52/11). However, the changes were only incremental. They focused on delivery, silence of administration, certain basic principles, and communication between the parties (Pavlovska Daneva et al., 2014).

Parallel with the LGAP amendments, further changes were implemented. Administrative decision-making was organized in two instances. First-instance proceedings were conducted by ministries, other state administrative bodies, organizations determined by law and other state authorities, legal and other persons with public competences granted by law, and municipal authorities, while second-instance proceedings were conducted by the Government's second-instance commissions. In 2011, the State Second-Instance Commission for decision-making in administrative procedures and labour relations procedures was established as an independent institution (Pelivanova and Ristovska, 2014).

Changes also happened in the administrative justice system. The Administrative Court was established in 2006, and the High Administrative Court was founded in 2011. The latter decides on the appeals against decisions of the Administrative Court.

However, these institutions were not able to resolve many shortcomings of the LGAP. It was claimed that the LGAP had created a non-efficient and long procedure and high expenses (Pavlovska Daneva et al., 2014). In its 2011 Report, the European Commission was of opinion that "To bring about a systemic change, a new, contemporary, and well-structured law would be necessary". The preparations for the new LGAP started in 2013 and domestic, regional, and OECD-Sigma experts were involved in its preparation. The new Law on General Administrative Procedure was adopted by the Parliament in 2015. It will enter into force in the second half of 2016, except for some provisions that are valid since the beginning of 2016.

The new LGAP introduces considerable innovations compared to the previous Law and it follows the modernization path that has been applied in the countries of the Region.

The following can be listed as some of the main novelties of the new Law:

- Precise definition of administrative matters and administrative act;
- Acceptance of European terminology and European standards, e. g. introduction of the term of services of general interests;
- Introduction of the new principles such as the principle of proportionality and the principle of service orientation of public authority;

- Simplification of administrative proceedings;
- Regulation of new information technology usage, e. g. electronic communication between parties and public authorities and obligatory electronic communication between public authorities; electronic signatures;
- New institutes, such as administrative contracts (although their use is admissible only in the areas stipulated by special legislation);
- Enhancement of citizens' rights – e.g. introduction of protection against real acts of public authorities and in relations with providers of services of general interests;
- Introduction of new legal remedies (administrative complaint), modernisation of legal remedies, and reduction of the number of so-called extraordinary legal remedies.

(B) The Macedonian LGAP of 2015 is shorter in comparison to the previous Law and regulates several new institutes not regulated by the 2005 LGAP. LGAP reform in Macedonia has been supported by SIGMA, which positively assessed the Law prior to its adoption.

Macedonian LGAP contains only one article that regulates the relationship between general and special administrative procedures. Art. 2, entitled Application of the Law, stipulates the following:

“(1) This Law shall apply to all administrative actions of public authorities and service providers.

(2) Special laws may regulate certain deviations from this Law, which must not be contrary to the basic principles and the purpose of this Law and must not impair the protection of rights and legitimate interests of the parties guaranteed by this Law.”

A closer analysis of Art. 2 shows that the intention of the legislator is to restrict special administrative procedures as much as possible. The first paragraph states that, as a rule, the LGAP shall be applied in “all administrative actions of public authorities and service providers”. This practically means that the public sector as a whole has to apply the Law and this refers not only to the central government bodies (state administration), but also to local self-government bodies and providers of public services (services of general interest), including private law entities when they act as public service providers.

When it comes to different regulation of certain issues of administrative procedure by special laws, the second paragraph sets several conditions that have to be respected. Firstly, only certain issues of administrative procedure

may be regulated differently by special laws. Secondly, such regulation must not be contrary to the “basic principles and the purpose” of the LGAP. This has to be applied having in mind the whole LGAP and not just the part of it formally called Basic Principles (Chapter II, Art. 5–17). Every LGAP is a coherent body of legal provisions that has to be respected as a whole. The basic principles formally regulated in Chapter II must be systematically followed through the complete text of the LGAP. Thirdly, creators of special laws that regulate some elements of administrative procedure differently from the LGAP must be cautious not to deteriorate the level of legal protection of participants to the procedure established by the general LGAP.

The provisions that explicitly open the door to special regulation of particular institutes can be found in 10 articles. These are issues connected with some aspects of conducting the procedure (Art. 24/2), relationships within collegiate bodies (24/4), deadlines (28/6, 106/1), participation of several parties in the procedure (36/2), limitation of the right to inspect the files (43), notification deadlines (86/3) and administrative contract admissibility (98/1).

Some of the newly regulated legal institutes – which were introduced as the major novelty during the public debate on the new LGAP – are completely dependent upon the adoption of special legislation. This is particularly the case with administrative contract, which, although regulated by the new LGAP, is to be implemented only in those administrative areas that are stipulated by special legislation. Art. 98/1 regulates admissibility of the administrative contract in the following way: “(1) For the purpose of performing a public service falling within the competence of the public authority, when stipulated by a special law, the public authority may conclude an administrative contract with the party if the conclusion of such contract is in the public interest and it does not limit the rights of third parties.”

It seems that the legislator intended to achieve legal simplicity and certainty that should rise from a general administrative procedural law which has to be simple and easy to understand not only by ordinary civil servants but also by citizens. Nevertheless, it will be hard to stop the flourishing of special procedures having in mind the former Yugoslav administrative tradition, general legal principle according to which *lex specialis derogat legi generali*, and non-existence of an efficient system of administrative barriers that should stop special procedures from being introduced even in the situations where it is more than obvious that special administrative procedure – as a whole or some parts of it – is neither justifiable nor required needed.

(C) Ministries, state administration bodies, organizations established by law, other state authorities, legal entities and natural persons entrusted with

exercise of public authority, as well as municipal authorities, authorities of the City of Skopje, and municipalities within the City of Skopje are obliged to proceed pursuant to the rules regulated by the LGAP when, in exercising their legal competences, they act, decide or undertake other administrative actions in administrative matters (Art. 1).

Pursuant to the Law on Organization and Operation of the State Administration Authorities (OG No. 58/00, 44/02, 82/08, 167/10, 51/11; LOOSAA), state administration authorities are ministries, administrative organizations and other state administration authorities (Art. 5). The latter, depending on their responsibilities and level of autonomy, may be autonomous (departments, agencies, commissions, Archive) or authorities subordinated to a ministry (administration, bureau, service, inspectorate, and port authority). The autonomous state administration authorities report to the Government and the subordinated authorities to the competent minister (Art. 7). By reducing the number of ministries this law has introduced the most significant change in the organization of state administration since Macedonia gained its independence. Currently, there are 14 ministries comprising 36 subordinated organizations.

Organizations established by law are intended to perform certain professional and other activities that require the application of scientific methods and related administrative procedures in the areas covered by the respective ministries (institutes, resorts, offices).

Other state authorities are state bodies established by special laws directly by the Parliament to which they are responsible. They are not covered by a general law. Their competences divide them into classical administrative bodies established and responsible to the Parliament (e.g. Personal Data Protection Agency, State Commission deciding in second-instance administrative proceedings and working relations, The Commission for Access to Public Information, Agency for Administration) and regulatory bodies (e.g. Energy Regulatory Commission, Agency for Insurance Supervision, Agency for Electronic Communications, Agency for Audio and Audiovisual Media Services). There are 18 organizations of this type in Macedonia.

Legal entities and natural persons entrusted with exercise of public authority are public enterprises as well as private enterprises with public authority supplying services of general interest. There are 27 public enterprises founded in order to provide services of general interest.

Macedonia is currently divided into 80 municipalities. The number of municipalities was reduced in 2004 when 123 were amalgamated into 84 units, and in 2013 when they were further reduced to 80. The City of Skopje

consists of ten urban municipalities. Municipalities have their administrative apparatus performing administrative and other affairs within the scope of their activities, but they can also establish public institutions and enterprises providing local services of general interest. Currently, public utilities are provided by 132 suppliers established in the form of local public enterprises.

Until 2006 the competent authority for administrative dispute resolution had been the Supreme Court of the Republic of Macedonia. In order to settle the problems with ongoing delays in resolving administrative disputes, the model of administrative justice was changed and a specialized administrative court system was established. Pursuant to the Law on Courts (OG No. 58/06, 35/08, 150/10) the Administrative Court is competent for the appeals against particular acts adopted by the state administration bodies, the Government, other state authorities, municipalities and the City of Skopje, organizations established by public law, and legal entities when executing competences under public law, in cases where other kinds of legal protection is not provided. The Higher Administrative Court decides on appeals against decisions of the Administrative Court. According to the Law on Administrative Disputes (OG No. 62/06; LAD), the Administrative Court is the first-instance court deciding on suits filed against administrative acts passed by administrative organizations. Until the Law Amending the Law on Administrative Disputes of 2010 entered into force, the LAD had granted the Supreme Court power to decide on disputes on the legality of acts of administrative bodies, the Government and other state authorities, municipalities and the City of Skopje, organizations established by public law, and legal entities and other persons in exercising public authorities, when they decide on the rights and obligations of citizens in specific administrative cases as well as in disputes caused by the acts of those authorities in misdemeanour proceedings. However, according to the latest amendments, the Supreme Court of the Republic of Macedonia shall decide upon extraordinary legal instruments in the cases when it is stipulated by the LAD.

1.5. Montenegro

(A) The administrative reform in Montenegro began in 2003, when the Administrative Reform Strategy for the Period 2002–2009 and several relatively modern systemic laws were adopted. The reform was mainly oriented towards state administration and legal regulation of public administration, including administrative procedure and justice. According to the Law on State Administration System of 2003, ministries are bodies competent for policy formulation, law-drafting, and administrative supervision, while other

administrative bodies are competent for policy and law implementation. The Law on General Administrative Procedure (LGAP; Official Gazette of the Republic of Montenegro No. 60/03) was enacted on October 21, 2003 and went into force on October 31, 2003. Amendments and supplements to the LGAP were adopted in June 2011 (OG of Montenegro No. 32/11).

After gaining independence in 2006, Montenegro, like many other WB countries, determined EU accession as the main foreign policy goal. It acquired the EU candidate status in 2010 and started negotiations in 2012. The EU accession policy has led to significant efforts in order to meet EU requirements. Montenegro has tried, supported by the OECD-Sigma, to harmonise with the *acquis communautaire* in different policy sectors and to reform its public administration according to the European administrative standards.

In July 2011, the Government of Montenegro adopted the policy paper on major elements for drafting a new LGAP intended to be in line with both the principle of the rule of law and the standards of good governance common to the EU member states. The Ministry of the Interior (Mol) was in charge of the preparation of the new Law.

The drafting of the new LGAP lasted for almost three years and it was originally the task of the Inter-ministerial Project Group. The Pobjeda daily newspaper published the draft LGAP accompanied by the explanatory notes and public discussion agenda on 1 February 2013, and the text thereof was also posted on the Website of the Ministry of the Interior and on the e-Government Portal. In the course of public discussion that lasted for 60 days, two round tables and one conference were held.

After the completion of public discussion, the Mol established an Expert Team to further work on the new LGAP. The Expert Team completed their work late in November 2013, but the Draft Law went through additional changes during the harmonization process with the Secretariat for Legislation, the Ministry of Justice, the Ministry for Information Society and Telecommunications, the Ministry of Finance, and other relevant bodies. SIGMA and its experts continuously supported the preparation of the new Law. The title was changed into the Law on Administrative Procedures, indicating that it has to be the main procedural law in Montenegrin public administration.

The Parliament adopted the new LAP on 16th December 2014. The new Law was published in the Official Gazette No. 56/2014 (24 December 2014). It was originally planned for the new Law to enter into force on 1 January 2016, but it has been postponed until 1 July 2016. One of the components of the IPA project "Strengthening the Management of EU Funds and General

Administrative Procedures” that commenced on 7 April 2014 is dedicated to support implementation of the new LAP.

The new LAP incorporates a series of new legal institutes through which the Montenegrin legal system:

- transposes the European law principles,
- harmonizes the Montenegrin administrative procedural law with EU standards in an appropriate manner,
- ensures the development of modern administrative technology,
- simplifies and reasonably accelerates administrative proceedings,
- significantly enhances citizens’ rights and the protection of public interest, and
- focuses on regulation of relationships between citizens and public administration, while leaving the regulation of other issues to special laws and regulations.

The new Law conforms the Montenegrin legal system to the most important European legal documents, particularly to the Charter on Fundamental Rights of the European Union, which was enacted together with the Treaty of Lisbon and which, the same as the Treaty of Functioning of the EU, entered into force on 1 December 2009, as well as to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, and the EU Directive on Services in the Internal Market.

(B) The relationship between general administrative procedure and special laws is regulated in Article 4 of the 2014 LAP. The Law also contains general articles that regulate the relationship between general administrative procedure and special laws and opens possibilities for different regulation of particular legal institutes in special laws. Article 4 stipulates:

“(1) This law shall be applied in all administrative matters.

(2) Provisions of special laws which, because of the specific nature of administrative matters in certain administrative areas, provide necessary exceptions to the rules of administrative procedure cannot be contrary to the principles and aim of this law, nor impair the level of protection of rights and legal interests of the parties hereunder.”

One of the clearly stated intentions of the new LAP is to be the main procedural law, i.e. applicable in all administrative matters. This is explicitly stated in Art. 4, paragraph 1, which states, “This law should be applied in all administrative matters”. This is a clear sign of the legislator’s intention

to make the present law general in its nature and applicable in various administrative fields. Formulation of the new LAP is stricter than the previous law of 2003.¹³

As in some other analysed countries (e.g. Croatia, Serbia, Macedonia), the implementation of certain newly regulated legal institutes is directly dependent upon the adoption of special laws that are considered to be necessary legal preconditions for their implementation. This is the case with the implementation of administrative contract which is not directly applicable based on LGAP provisions but has to be explicitly stipulated in special laws. Art. 27/1 stipulates:

“For the purpose of establishing, modifying or termination of a legal relationship in the administrative matter within the competence of the public law authority, an administrative contract can be concluded between public law bodies and parties when it is prescribed by a special law, when concluding of such agreements is in the public interest, and when that agreement does not infringe the rights of third parties.”

An analysis of Art. 27/1 shows that conclusion of an administrative contract can take place only when such a situation is enabled by a special law. Reasons behind such legal regulation can be found in hesitation and fear of the possible negative consequences of direct application of administrative contract as the new institute that has not been previously regulated in the LGAPs of WB countries.

Similar restrictions are found in Art. 117/1, which regulates silent consent rule:

“When the administrative procedure is initiated at the request of the party, and public law authority does not issue or deliver its decision within the prescribed or extended period, it shall be deemed that the request is approved, if it is prescribed by a special law.”

According to Art. 117/1 the silent consent rule is applicable in administrative procedure only if it is explicitly regulated in a special law. By regulating silent consent in this manner, the legislator has obviously tried to prevent possible

13 LGAP states the following: „The provisions of special laws which due to the specific nature of administrative matters in certain administrative areas provide necessary deviation from the rules of general administrative procedure must be in compliance with the basic principles defined by this law.“ (Art. 3 of the 2003 LGAP, OG 60/03, 32/11). Formulation of the text is much more flexible (special laws „have to be in accordance with basic principles established by this law“) in comparison with the new 2014 LAP which explicitly says (Art. 4/2) that special laws containing procedural provisions „could not be contrary to the basic principles and goals of that law and shall not diminish the level of protection of rights and legal interests of parties regulated by this law.“

unintended consequences of direct application of this rule in everyday administrative practice.

Nevertheless, from the standpoint of general administrative procedure, such provisions of Art. 27/1 (administrative contract) and Art. 117/1 (silent consent rule) do not contribute to the proclaimed intentions in Art. 4 which tries to position the LAP as a genuine general procedural law, meaning a directly applicable procedural tool that can be applied to various administrative areas without any other legal authorisation. Restriction of application of certain institutes introduced by the general procedural law should serve only to protect necessary particularities of a narrow circle of special administrative procedures and not as a way to dismantle general procedural institutes and concepts. Such restrictive provisions require a firm political support and continuous administrative efforts to determine sectors in which the new institutes, such as administrative contract or the silent consent rule, will be regulated explicitly. It can be predicted that these new institutes will hardly be provided for in special laws.

Regarding the situations in which the new LAP explicitly opens the door to different regulation of certain institutes, it should be noted that there are 18 such cases. Possibility for different regulation exists in the following situations: name of the administrative act (Art. 18/1), short form of explanation of the administrative act (23/1), administrative contract (27/1; 29), protection of users of the services of general interest (31/1, 2), other administrative actions (32; 35/1), one-stop shop (43/1), legal aid (44/5), legal representative (54/3), reasons to decline the status of temporary representative (55/4), costs (94/1), deadlines (114, 130), the silent consent application (117/1), form of complaint and other issues connected with it (138) and administrative enforcement (148/1).

(C) Public law bodies engaged in administrative procedures were defined by the LGAP of 2003 (OG No. 60/03, 73/10, 32/11) and comprise state bodies and local government bodies as well as institutions (*ustanove*) and other legal entities vested with public authority. The new LAP of 2014 stipulates that public law bodies are state bodies, state administration bodies, local self-government bodies, local government bodies, institutions, and other entities vested with public authority.

State administration comprises two groups of state bodies: ministries and other administrative bodies. The latter are established as administrative bodies belonging to the ministries. On an exceptional basis, when scientific and special professional working methods and knowledge are required for the performance of administrative tasks or when no conditions for the establishment of the ministry exists in an administrative area, as well as

when it is prescribed by a special law, administrative bodies are established as independent administration bodies (Art. 28 of the Law on State Administration, OG No. 38/03, 22/08, 42/11; LSA). There are five types of state bodies: administrations (*uprave*), secretariats (*sekretarijati*), institutes (*zavodi*), directorates (*direkcije*), and agencies (*agencije*). Administrations are bodies which directly apply laws and other regulations, and decide on the rights and duties of natural, legal, and other entities (Art. 30). Secretariats are bodies which in general perform professional affairs, and may perform certain administrative and other tasks (Art. 31). Institutes perform professional and related administrative affairs by application of scientific methods and knowledge (Art. 32). Directorates perform professional and related administrative affairs in the field of economics (Art. 33) and agencies perform professional and related administrative affairs by implementation of market principles, i.e. they provide services and ensure improvement and development (Art. 34). Based on the Decree on Organization and Functioning of the State Administration (OG No. 05/12, 25/12, 61/12, 20/13, 17/14, 06/15, 80/15) 53 state administration bodies have been established: 16 ministries, 20 administrative bodies belonging to ministries (14 administrations, 1 office, 4 directorates and 1 agency), and 17 independent bodies (7 administrations, 2 secretariats, 6 offices, 1 directorate and 1 agency).

Pursuant to the Law on Territorial Organization of Montenegro (OG No. 54/11, 26/12, 27/13, 62/13, 12/14), Montenegro has 21 municipalities, the Capital City of Podgorica and the Old Royal Capital (Prijestonica) Cetinje. They are managed by the president of municipality, elected by the local council. Local administrative apparatus comprises local government bodies (secretariats, administrations, directorates, bureaus, etc.) established for administrative tasks, and communal police, special services and centres established for specific tasks. The president of municipality may establish agencies for performing the tasks requiring professional skills and independence (Art. 70 of the Law on Local Self-Government, OG No. 42/03, 28/04, 75/05, 13/06, 88/09, 03/10, 73/10, 38/12, 10/14). Local administrative bodies are engaged in administrative procedures within their own scope of competences as well as when performing delegated state administration tasks.

Local self-government refers to a wider system of public bodies vested with public authority, which, unlike state government bodies, do not perform original government tasks but public affairs delegated by laws or Government's decrees. Public affairs performed by public bodies may relate to authoritative competences or to provision of public services (services of general interest in various fields). However, there is no unified legal regulation of the organization, status, and functions of public bodies, which makes the system very complex. There are many special laws regulating

certain organizational forms of public bodies such as special organizations, regulatory bodies, funds, professional and other associations (chambers), companies, public services (institutions, public companies, concessionaires), local self-government, other forms (commissions, institutes, offices), natural entities – notaries, etc. Public bodies at the central level are established by law or other regulation passed by the Parliament or the Government. Those at the local level are established by the local councils. According to an analysis, the total number of public bodies is 604. The most numerous public organizations are public institutions (*javne ustanove*) providing non-economic public services to citizens.

The Administrative Court of Montenegro has been deciding on administrative disputes since 2005. Its jurisdiction covers the whole territory of Montenegro and it is located in Podgorica. Previously, administrative justice was part of the system of regular courts, i.e. the Administrative Department of the Supreme Court was authorized to decide on the legality of individual administrative acts passed in administrative procedures. Two extraordinary legal remedies which may be submitted against the Court's decision are stipulated by the Law on Administrative Disputes (OG No. 60/03, 73/10, 32/11). The Supreme Court decides on the request for extraordinary review of decisions passed by the Administrative Court.

1.6. Serbia

(A) Serbia has inherited the tradition of detailed legal regulation of general administrative procedure. Such tradition is based on the previous Yugoslav LGAP (ZUP) that influenced all of the former Yugoslav republics even in the post-1990 period. After dissolution of the socialist Yugoslavia, Serbia continued to implement the Yugoslav LGAP with few amendments and changes. This law was in force until second half of the 1990s when Serbia adopted a new LGAP (LGAP-1997; *Zakon o opštem upravnom postupku*, OG 33/97, 31/01, 30/10).¹⁴ Regarding the content, the 1997 LGAP followed the old Yugoslav model of general administrative procedure. Thus, the Law indicated continuity in legal regulation of administrative procedures in Serbia.

Drafting a modernized LGAP in Serbia was heavily influenced by the process of Europeanization and preparation for the prospective EU membership. In 2011 SIGMA supported the process of drafting the new LGAP. However, political changes influenced the initial draft prepared under SIGMA support.

14 For the development of LGAP during the 20th century in Serbia, see e.g. Lilić, 2010: 408–410.

It had been changed significantly and many elements of the 1997 LGAP had been reintroduced. Nevertheless, SIGMA gave it the green light and the Draft Law was sent to parliamentary adoption procedure in 2013.

After the change of Government in March 2014, the Draft was withdrawn from the parliamentary procedure. The new government established yet another working group for drafting the final version of the LGAP. There had been several versions of the text before the final one was agreed upon in October 2015. Even that version was additionally modified and upgraded, and finally submitted to the Government for adoption procedure in January 2016. The new Serbian LGAP was adopted in February 2016. It will be in force as of 1 June 2017. The Draft LGAP of 2013 had 167 articles and was much shorter than the October 2015 (223 articles) and the LGAP 1997 (291 articles). The Draft of October 2015 contains some 784 legal norms while the 1997 LGAP had 767 legal norms, which means that the Draft has more provisions than the current LGAP. The Draft LGAP submitted to the Parliament contains 217 articles. It has been slightly modified in comparison to the October 2015 version. The final version of the LGAP regulates the same institutes as the previous version although several articles have been merged and some parts of the text rearranged due to comments from the interested public and international experts.

The new Serbian LGAP of 2016 contains several new elements in comparison to the 1997 LGAP. It regulates certain institutes that have not been regulated before. These include one-stop shop, guarantee act, administrative contract, access to public information, electronic communication, new system of legal remedies, and nomotechnical and linguistic improvements of the traditional legal institutes. In spite of the proclaimed intention to modernise administrative procedure and regulate new institutes, the latter have not been regulated thoroughly. Their regulation encompasses few articles, while other legal institutes are regulated in great detail. The LGAP of 2016 is in line with tradition in the Region, with some elements of modernisation.

(B) The LGAP of 2016 devotes special attention to the relationship between general and special administrative procedures. This issue is regulated in Art. 3, which sets the general principle according to which the LGAP shall be applied in all administrative matters, allowing and setting the limits for exceptions that may be regulated by special laws.¹⁵

15 Art. 3: „(1) This law shall apply to proceedings in all administrative matters.

(2) Individual issues of administrative proceedings may be regulated otherwise by special laws, only if necessary in certain administrative areas, if it is in compliance with basic principles pursuant to this law and if it does not reduce the level of protection of rights and legal interests of the parties guaranteed by the law.“

The legislator's intention has obviously been to establish the LGAP as a general administrative procedural law. This is the main reason why Art. 3 regulates that a) certain issues of administrative procedure may be regulated differently by special laws, b) only in those cases in which that special regulation is really necessary, c) different regulation must be in compliance with the LGAP, and d) must not decrease the level of protection of rights and legal interests guaranteed by the LGAP.

When compared to the 1997 LGAP (Art. 3), it is clear the 2016 LGAP is much stricter in this sense. It explicitly states that the LGAP shall be applied in all administrative matters, and that special laws shall be exemptions that may be used only in special cases when departure from LGAP regulation is indeed justifiable and needed.

The 2016 LGAP does not contain an explicit stipulation on the subsidiarity of LGAP in relation to other procedural laws. This omission could be interpreted as a clear intention of the legislator to make the LGAP applicable in as many administrative areas as possible and to reduce the number of special administrative procedures.

The Draft Law contains one novelty when it comes to special administrative procedures: there is an explicit obligation to align special laws with the new LGAP once that Law has been adopted. Art. 214/1 stipulates that special laws which contain procedural rules will have been harmonized with the LGAP by 1 June 2018. Obligation to harmonise special laws with the LGAP has to be accompanied with the assessment whether these special laws have to contain specific procedural rules at all or not. Without that obligation, there is a real danger that mushrooming of special administrative procedures could survive the process of harmonisation with the new LGAP.

There are 13 situations in which the LGAP of 2016 explicitly opens possibility for different regulation of some institutes by special laws. Besides Art. 3 of the Draft, these include: name of the administrative act (Art. 17/3), application of guarantee act (18/2), several cases of deadlines (19/3; 29/3; 152/5), reasons for not taking the role of temporary representative (48/4), electronic communication and notification (57/2; 81/3), direct decision (104/4), issues connected with witnesses (125/4), silent consent between authorities (138/4), repeal of administrative act (184/1).

Finally, according to the 2016 LGAP, special laws are rather important for the application of several newly regulated institutes such as administrative contract, guarantee act, and some cases of the silent consent rule. Administrative contract cannot be directly applicable based on the LGAP, but would have to be explicitly allowed by certain special law. Article 22/1

clearly stipulates “Administrative agreement is a bilateral written document which, when stipulated by a special law, shall be concluded between the public authority and the party and which shall create, amend or terminate legal relationship in an administrative matter.”

Such restrictive regulation makes application of administrative contract completely dependent upon the adoption of special law in each administrative area in which this institute may be considered for implementation.

There is more or less similar situation with certain other newly introduced institutes of administrative procedure, especially with the guarantee act and some issues connected with the silent rule principle. Art. 18/2 states that “a guarantee act could be issued only when prescribed by a special law”. This regulation makes application of this institute completely dependent on the adoption of special laws.

The 2016 LGAP occasionally regulates the relationship between general and special law in a different manner. The example is Art. 138/4 which regulates the silent consent between administrative authorities in the way that silence from one administrative authority in due time represents consent upon which another authority can rely in the process of resolving an administrative matter: “Public authority is obliged to deliver prior or subsequent consent or opinion to the public authority rendering a decision within 30 days from receipt of application. When public authority fails to act within the given time limit, it shall be considered that such public authority has given their consent or opinion.”

In this case (Art. 138/4 second sentence), adoption of a special law does not serve as a necessary precondition for implementation of the silent consent rule (as in the case of administrative contract), but only as an instrument that could exclude the application of that rule in a particular administrative area if its application in that area is not suitable due to various sector-specific reasons. This is correct application of the relationship between general and special laws according to which institutes regulated in the general law have to be applied always except when a special law excludes that application or regulates it differently due to reasons specific to the particular administrative field.

(C) Pursuant to the current LGAP (Official Gazette of the Federal Republic of Yugoslavia No. 33/97, 31/01, and Official Gazette of the Republic of Serbia No. 30/10), the bodies engaged in administrative procedure are administrative bodies and other state bodies as well as companies and other organizations vested with public authority (Art. 4).

There is similar regulation in Art. 1 of the 2016 LGAP which explicitly enumerates those who are obliged to apply the LGAP: a) state organs (*državni organi*), b) organs of regional and local self-government (*organi pokrajinske autonomije i lokalne samouprave*), c) companies (*preduzeća*), d) institutions (*ustanove*), e) organizations (*organizacije*), f) special organs through which the regulatory function is being performed (*posebni organi preko kojih se ostvaruje regulatorna funkcija*), and g) individuals who have been vested with public authority (*pojedinci kojima su poverena javna ovlašćenja*). The Law uses a general term *organ* for all actors who are obliged to use the LGAP in issuing administrative acts.

The Law on State Administration (Official Gazette of the Republic of Serbia No. 79/05, 101/07, 95/10, 99/14) provides for three types of state administration bodies at the central level: ministries, administrative organs within ministries, and special organizations. Administrative bodies within ministries (integrated authorities) may be established as authorities, inspectorates, and directorates. Special organizations, which may be established as secretariats or bureaus, have been given legal entity, and are separated from the ministries because of the need for greater autonomy than that required by an integrated authority. Since 2004, special organizations may be established by special laws and not only by the Law on Ministries, as before. There are also administrative districts (*okruzi*; 29 of them) as the lower-level state administrative bodies. The Law on Ministries has established 16 ministries and 10 special organizations (OG RS No. 44/14, 14/15, 54/15).

Public agencies are state bodies that have their own, separate legal entity and may exercise certain public competences conferred by law, but they are not a part of the state administration system. The Law on Public Agencies (OG RS No. 18/05, 81/05) defines public agencies as organizations established to carry out developmental, specialised and/or regulatory tasks of public interest that do not require a constant direct political supervision, provided that such tasks can be more efficiently performed by this type of organization than by a state administration authority and in particularly when the task can be entirely or mainly financed from the fees paid by the users of the services rendered (Art. 2). The founding rights are executed by the state government, but the sub-national governments may also establish public agencies for the implementation of their affairs (Art. 8 and 55). In practice, the term agency is used for organizations with different statuses and a large number of public agencies (in wider sense) have been developed based on sectoral regulations that make the state administrative organization rather complicated.

According to the Constitution of the Republic of Serbia (OG RS 83/06), in the Republic of Serbia, there are the Autonomous Province of Vojvodina and

the Autonomous Province of Kosovo* and Metohija (Art. 182/2). However, in 2008, Kosovo* declared its independence from Serbia, and as of June 2015, 112 countries have formally recognized it as an independent state. The Autonomous Province of Vojvodina has its own administrative bodies, i.e. 11 provincial secretariats with competences in specific fields. Serbia is divided into 29 administrative districts with the status of deconcentrated state administrative bodies.

The local self-government system consists of 150 municipalities, 23 towns and the City of Belgrade as a special territorial unit. On the territory of the City of Belgrade 17 urban municipalities have been established as a form of submunicipal autonomy. All of them have their own administrative bodies that conduct administrative procedures.

Public services are provided by the providers of non-economic public services established in the form of public institutions (*javne ustanove*), and public or privatised companies providing economic public services. Some of the public enterprises is still owned by the state or have a mixed status, a combination of social and private property due to slow privatisation processes.

Serbia has single-instance system of administrative justice. The Administrative Court located in Belgrade with branch offices in Kragujevac, Niš, and Novi Sad was established in January 2010. Judicial decisions issued by the Administrative Court are subject to extraordinary review procedure before the Supreme Cassation Court.

1.7. Comparative Overview: Austria, Slovenia, and Croatia

1.7.1. Austria

(A) Austrian codification of general administrative procedure in 1925 was the first successful GAPA codification in the World. Current GAPA was adopted in 1991 and has been in force since 1993 (AVG, Allgemeines Verwaltungsverfahrensgesetz, Official Gazette of the Republic of Austria, 51/91 and amendments).¹⁶ The AVG has 82 articles (with some added later on, such as 13a, 39a or 64a). Additionally, there are some other laws relevant to administrative procedures, such as laws regulating administrative execution (Verwaltungsvollstreckungsgesetz), notification (Zustellgesetz), administra-

¹⁶ Allgemeines Verwaltungsverfahrensgesetz 1991 – AVG, https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Erv&Dokumentnummer=ERV_1991_51

tive disputes and courts (Verwaltungsgerichtsbarkeits, Verwaltungsgerichtshofgesetz, Verwaltungsgerichtsverfahrensgesetz, Verfassungsgerichtshofgesetz, etc.). All the mentioned laws have been adopted at the federal level.

The main characteristic of Austrian regulation is that its scope is limited to individual administrative decision-making, which results in issuing individual administrative acts, but there are no general law-making proceedings and no administrative contracts – as, for instance, in the German law (Adamovich and Funk, 1987: 292–293). However, at the general level there are well-known guidelines or standards (*Weisung*) as internal interpretation of general normative acts but they are not issued under the AVG scope either.

In the Austrian Constitution one must distinguish individual normative acts (decisions – *Bescheid*) and direct exercise of command and constraint power from administrative authorities (*faktische Amtshandlung*).

In comparison to Germany, Austrian regulation is more formal and detailed, despite several reforms and amendments to the AVG. Regarding technical means for notification, for instance, the AVG is one of the more elaborate, regulating manners of written notification in Art. 18, subsection 3. This is probably connected to the interpretation of the provision from Art. 18, subsection 1 of the Austrian Constitution which states: “The entire public administration shall be based on law”. Furthermore, the general statute on civil servants requires civil servants to behave in the way that enables the public to remain confident in the correct discharging of their duties (e.g. Art. 43 *Beamtendienstgesetz*).

Administrative procedures are conducted in different fields and by various authorities, including local agencies, in both economic (like chambers of commerce) and social spheres (social insurance institutes, universities, etc.). One must distinguish the exercise of public power prerogatives (*Hoheitsverwaltung*) and private economic activities (*Privatwirtschaftsverwaltung*). The status of the authority or agency is not relevant; what is relevant is the nature of tasks that are performed. In such a functional sense, the concept of AVG includes public and private corporations which exercise public authority (Adamovich and Funk, 1987: 143–155).

Parties are the ones whose rights and obligations are the matter of administrative relations, but there are others that are affected by the authorities’ conduct and decisions based on legal title or legal interest (Art. 8 of the AVG *et seq.*).

The Austrian GAPA does not define the fundamental principles – they are derived from different rules, e.g. impartiality (Art. 7), protection of parties

(10–13a), material truth (45–46), right to be heard (37, 46), economy (39), reasoned decision (58, 60), right to appeal (58 and 63 et seq.), etc. Furthermore, lawfulness and anti-discrimination are stipulated directly by the Constitution. Issuance of a decision without undue delay, no later than six months, second-instance control by Länder independent administrative chambers can be followed by the Administrative Court Review (before general or special asylum court constituted in 2008¹⁷), tribunals, and the Constitutional Court. It is important to emphasise Austrian efforts to achieve competent decision-making in the second instance. The specific situation of traditional Austrian administrative justice, organised in one instance before the reform of 2012, ought to be taken into account.

However, the latter has been subject to recent reforms (2012 onwards), resulting in an unintended effect of the enhanced role of supervisory competences of administrative authorities based on Art. 68 of AVG (Bundschuh-Riesender and Balthasar, in Dragos and Neamtu, 2014: 209–232). By amendments to the Federal Constitution in June 2012, nine regional and two federal Administrative Courts of first instance were created as well as the second-instance Administrative Court. This reform went into force on 1 January 2014. Simultaneously, almost all types of administrative appeals and all kinds of existing administrative tribunals ceased to exist.

The GAPA has been amended several times. Some of the changes have been occasioned by the necessity to further support e-communication, which is otherwise regulated rather scarcely.

The Austrian GAPA regulates three traditional legal remedies, categorised into two groups in part IV (titled Legal Protection). Section 1 deals with the appeal (Art. 63–67) and Section 2 with “other modification of administrative decisions” including a) modification and remedying ex officio (Art. 68), and b) reopening of a proceeding (Art. 69–70). Additionally, the same section deals with “reinstatement into the previous legal position” (Art. 71–72).

The Austrian GAPA does not explicitly establish a special control body overseeing the execution of procedural rules. However, there is a special federal office of *Volksanwaltschaft* responsible for “appeals” where traditional legal remedies are impermissible or unsuccessful. In case the “appeal” is grounded, a recommendation is issued to the competent authority which is obliged to remedy the position or reason why it has not taken certain measures in eight weeks.

17 In 2008, the former Federal Independent Asylum Senate, which was an administrative tribunal, became the Asylum Court. After the 2012 reform, this (specialized) court was transformed into one of the two new federal administrative courts of first instance.

(B) The Austrian GAPA does not contain a general provision that would say anything particular regarding the relationship between that general administrative law and special laws that might regulate some of the administrative procedural issues in a different manner. The very name of the law (*General Administrative Procedure Act*) suggests that the aim of the legislator was to make a piece of legislation that could serve as a general law applicable to various administrative fields, at different levels of government, and by a wide variety of bodies vested with public authority. However, the Law itself does not have a general article stating that the Law is applicable in all administrative matters and determining under which conditions special regulation of one or more legal institutes could be regulated differently.

Special regulation of individual institutes of the Austrian administrative procedure is regulated in the Austrian GAPA in several places. An analysis of the GAPA text shows that 15 legal norms explicitly provide grounds for the departure from legal solutions stipulated in the GAPA. These are issues connected with jurisdiction (Art. 2, 3), conflict of jurisdiction (4), legal capacity to act (9), submissions (13/1), electronic communication (13/2), memoranda on information about administrative procedure (16/1), inspection of files (17/1), personal delivery (22), deadlines (33/4; 73/1), preliminary issue (38), indirect evidence collection by the court (55/2), form of administrative decision (act) (62/1), and procedure costs (exemption from fees 78/1, 2). In all these cases, special laws may regulate the mentioned issues and institutes differently from the GAPA, based on its explicit provisions.

Unlike the new LGAPs in the Western Balkans, which sometimes make new institutes dependent upon the adoption of special laws, the Austrian GAPA has different solutions. It regulates institutes of administrative procedure in a general manner, i.e. directly applicable based on the GAPA, and only in some cases (as shown in previous paragraph) open the door to different regulation by special laws.

(C) Austrian federal administrative structure is three-tiered comprising federal state (*Bund*), nine provinces (*Bundesländer*; Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tyrol, Vorarlberg, and Vienna) and 2,357 municipalities (*Gemeinden*) with corresponding administrative organizations. There is also a network of 99 administrative districts (*Verwaltungsbezirke*) which are established only for administrative purposes and are organizationally integrated with provincial administrations or with large cities (15 large cities hold the function of the administrative district).

The federal government is run by the federal chancellor, vice-chancellor, and federal ministers, who are in charge of their respective federal departments. A

federal department consists of a federal ministry and the subordinate agencies comprising a variety of organizations (e.g. tax offices, as well as schools). Pursuant to the Federal Ministries Act (BMG, *Bundesministeriengesetz*, Official Gazette of the Republic of Austria, 76/86 and amendments¹⁸), there are currently 13 federal ministries.

Besides federal administration, there are numerous legally independent agencies resulting from the spin-off process of the transformation of a governmental agency into an independent institution or a company. In 2011, there were approximately a hundred independent agencies controlled by the relevant federal ministry – spin-off products of various public services, such as museums, theatres, universities, postal services, and others.

Unlike federal administration, provincial administrative apparatus is not organized according to the department system. The affairs of the common provincial government office are managed by the governor at the political level and head of the provincial government office at the administrative level. There are also numerous independent agencies (especially hospitals) with certain financial and control relationship with provinces resulting from the spin-off process at the provincial level.

Administrative management in municipal offices is the task of the municipal secretary or city office director. Municipalities are in charge of numerous public services (services of general interest) such as the creation of educational, social, and cultural infrastructure.

1.7.2. Slovenia

(A) In Slovenia, which became an independent state in 1991, the regulation of general administrative procedures is based on the former Yugoslav and Austrian legacy (General Administrative Procedure Act; *Zakon o splošnem upravnem postopku*, Official Gazette of the Republic of Slovenia No. 80/99-ZUP, 70/00-ZUP-A, 52/02-ZUP-B, 73/04-ZUP-C, 119/05-ZUP-D, 24/06-UPB2, 105/06-ZUS–1, 126/07-ZUP-E, 65/08-ZUP-F, 8/2010-ZUP-G, 82/2013 ZUP-H; Kovač, 2013: 39–41; Androjna and Kerševan, 2006). Specific procedural matters are regulated by sector-specific laws (Art. 3 of the GAPA). The original text of the GAPA (1999) contains 325 articles. Along with that, there are several implementing acts adopted on the grounds of the GAPA, in particular the Decree on Administrative Operations, the Rules on Costs in Administrative Procedure, the Rules on Certifying Completeness and Finality, etc.

18 *Bundesministeriengesetz* 1986 – BMG, StF: BGBl. Nr. 76/1986 (VV), with amendments.

The GAPA is very similar to the legislation once applied on the territory of Slovenia, mainly the Yugoslav GAPAs with an earlier code called Steskov postupnik (1923). Slovenia has a long tradition of (general) administrative procedure that has existed for over 90 years.

Slovenia can claim full compliance with European rights and principles. It has adopted several GAPAs and sector-specific laws harmonised with the EU. Some were adopted before full membership, gained in May 2004, and others later, due to European standards and trends, encouraged particularly by the European red tape programme (such as the Directive 2006/123/EC on services in the internal market, by introducing, for instance, field positive fiction in case of administrative silence; Kovač, in Dragos and Neamtu, 2014: 389–391).

With regard to the significance and number of administrative procedures, the GAPA represents one of the most important acts in the legal system of the Republic of Slovenia. According to the records of the Ministry of Public Administration, some 10 million first-instance administrative decisions are issued in Slovenia every year.

The GAPA in Slovenia may be applied subsidiarily or *mutatis mutandis* to other public law, non-administrative procedures if so provided by the sector-specific law or if it involves a (substantively defined) public law matter for which the procedure is not regulated by sector-specific regulations (Art. 4 of the GAPA). The effectiveness of any institution stipulated in the GAPA is to a certain extent determined by the actual use of the GAPA in all such matters, since the basic principles of the Law serve as minimum procedural safeguards for the protection of the rights of the parties. The application of the GAPA depends on the subject matter decided in the procedure rather than on the type or status definition of the deciding authority. Therefore, administrative procedures may also be conducted by private institutes or companies, if they exercise public powers on behalf of the state or other authority (e.g. municipality).

The protection of parties' rights is a feature of a democratic state in both substance and scope of administrative cases. At the very core of the efficient protection of parties' rights are two rights following from the Constitution of the Republic of Slovenia and the ECHR: (1) the right to legal protection (with legal remedies for challenging authoritative decisions), and (2) the right related to the application of legal remedies, as well as a related but independent right to trial within a reasonable time.

The Slovenian GAPA was mentioned in strategic documents concerning public administration reform between 1996 and 2015. The 1996 Parliamentary

Strategy aimed at reforming the Slovenian public administration to meet the requirements of EU membership put special emphasis on the significance of administrative procedural law. This Strategy defined the revision and adoption of the Slovenian GAPA as a foundation of the democratic system for the protection of individuals against the possible abuse of power, together with judicial control over public administration and the ombudsman. Later reforms mostly dealt with de-bureaucratization of regulation, for instance with reduced legal remedies and deadlines to apply them, or with easier notification (amendments adopted 2005–2013).

Additionally, several organizational measures have been successfully realised of over the last 15 years with no re-regulation required to comply with EU standards. These measures include data exchange within public databases, one-stop shop in some fields, strengthened e-government programmes, and training programmes dealing with civil servants' problem-solving attitude. After 1999, the Slovenian GAPA has introduced some institutes effective in practice but a novelty in the regional mind-set, such as the scope of the GAPA in the delivery of public services and administrative enforcement.

However, the traditional Slovenian regulation still overprotects the rights of parties in relation to the efficiency of administrative procedures and the implementation of the public interest. In both Slovenia and the region, codifications, even on a general level, are usually far too detailed and formalised due to copying the judicial inquisitorial procedure. Furthermore, approaches that are considered more progressive, such as alternative dispute resolution methods in administrative matters, are underdeveloped (Kovač, in Dragos and Neamtu, 2014: 387–389).

In Slovenia, legal protection or control over legality in administrative proceedings is defined in several ways. Just as in the documents of the Council of Europe, particular importance is given to judicial supervision which provides for the functioning of a system of checks and balances as a component of the constitutional principle of the separation of powers. This is accomplished through administrative dispute, which is the court action following the completeness of a decision in a prior administrative procedure according to the Administrative Dispute Act (*Zakon o upravnem sporu*, ZUS–1, OG RS No. 105/06 and am.). Slovenia distinguishes judicial supervision, internal administrative supervision, and informal non-administrative supervision (e.g. the media). Administrative supervision consists of (1) instance supervision (assessment of the legality of decisions by means of appeal), (2) supervisory right (by line ministries through specific extraordinary legal remedies), and (3) horizontal forms of internal administrative supervision (in administrative matters, mainly administrative inspection according to Art. 307 and subsequent articles of the GAPA).

(B) The Slovenian GAPA follows the tradition of the former Yugoslav law regarding the structure and rationale, and especially in regulating the relationship between general and special laws.

Art. 3 of the Slovenian GAPA stipulates a general rule which regulates the relationship between that law as a general codification of administrative procedure and special laws.¹⁹ It can be concluded that a) only particular issues of administrative procedure in certain administrative field may be regulated differently from the GAPA and only if b) that is necessary for proceedings in that particular area. If c) there is special regulation for particular administrative areas, that regulation must be applied in that particular administrative field while d) the GAPA is applied in that administrative field only for those procedural issues which have not been regulated by a special law.

Art. 4 of the Slovenian GAPA is relevant for special procedures. It stipulates that the GAPA shall be applied in other public law matters that do not fall under the definition of “administrative matter” from Art. 2 and to which a special procedure is not applicable. This regulation aims to establish the GAPA as a truly general procedural law, which can be implemented in the whole public sector as the main procedural instrument. However, that goal is significantly diminished by the existence of numerous special laws that contain procedural issues different from those of the GAPA.

The specificity of Slovenian GAPA is explicit regulation of control over the GAPA and implementation of special procedures (Art. 307–307g). These provisions were introduced in 2010 in order to strengthen proper implementation of the GAPA and special administrative procedures.

Although the Slovenian GAPA with its 325 articles is rather long and detailed, legal grounds for departing from it exist in nine (9) situations only. The GAPA regulates the possibility of special procedures when it comes to regulation of the official representation of legal person (Art. 48/4), duty to represent (51/5), joint representative (52/1), summoning (70/3), duty to witness (183/3), reasons for nullity of the administrative act (279/1/6), administrative execution (287/2; 289/1), and different regulation of deadlines (290/2).

(C) The bodies obliged to apply the GAPA in Slovenia are administrative and other state bodies, bodies of local self-government units, and entities vested with public authority which directly apply legal regulation in administrative

¹⁹ „(1) Single questions of administrative procedure may regarding a certain administrative field be differently regulated in a special statute than in this Act, if this is necessary for proceeding in such a field. (2) In administrative fields for which a special administrative procedure is prescribed by statute, the special statute provisions shall be applied. However, the provisions of this Act shall apply to all questions which are not regulated by the special statute.“

matters when they decide on the rights, duties, and legal interests of individuals, legal entities, and other subjects (Art. 1).

Pursuant to the Law on State Administration (OG RS No. 52/02, 56/03, 83/03, 61/04, 97/04, 123/04, 24/05, 93/05, 113/05, 89/07, 126/07, 48/09, 8/10, 8/12, 21/12, 47/13, 12/14, 90/14; LSA) administrative tasks are carried out by administrative bodies, namely ministries, bodies affiliated to ministries, and administrative units (Art. 14). Currently, there are 14 ministries and 33 bodies affiliated to ministries (including 12 inspectorates). The latter are established in order to deal with specialized professional tasks, executive and developmental tasks, the tasks of inspection or other supervision and the tasks in the field of public services (services of general interest) if they achieve higher effectiveness and quality or if the task to be accomplished requires a higher degree of independence. Administrative units (58) are independent bodies of deconcentrated state administration operating at the local level.

The establishment of public agencies in order to conduct administrative affairs is provided by the law when 1) the performance of an administrative affair is more efficient and rational thereby, especially when the financing is provided from administrative fees or by users, or 2) continuous direct political control over the administrative affair is not required or applicable given the nature or type of the affair (Art. 15 of the LSA). Currently, there are 30 agencies in Slovenia. Other public law bodies as well as individuals and private law legal entities might be vested with public authority.

Public services (services of general interest) are performed by public institutions (*javni zavodi*), companies (*gospodarske družbe*), or other organizations including administrative bodies (Art. 13 of the LSA).

The territory of Slovenia is divided into 212 municipalities, 11 of them having the status of urban municipality. As the units of local self-government, municipalities have their own political bodies and administrative apparatus. The latter deals with autonomous local affairs, but it may be engaged in the performance of the affairs delegated by the state. Additionally, many services of general interest are delivered by public and private providers engaged in administrative procedures according to the functional criterion of public administration.

In Slovenia, judicial supervision of administrative affairs is carried out by the Administrative Court (*Upravno sodišče*) as the court of first instance with the seat in Ljubljana and deconcentrated departments in Celje, Maribor and Nova Gorica (Art. 9 of the LAD). The Administrative Department of the Supreme Court of Slovenia (*Vrhovno sodišče*) decides on legal remedies

in administrative dispute, namely appeal, revision, and repeated procedure (Art. 12, 14, 73, 83, 96 of the LAD).

1.7.3. Croatia

(A) At the beginning of the 1990s, Croatia took over the former federal general administrative procedural law with minor adaptations (Law on General Administrative Procedure, LGAP; Official Gazette 53/91, 103/96). The Law was taken over in its 1986 version without substantial changes. Although the Yugoslav LGAP was a modern law at the time it was first enacted (1956), it could not respond to the needs of the twenty-first century public administration and society. It was thought to be formalized and bureaucratic. In addition, the Law was considered to be one of the reasons for having a huge backlog of cases and for the inordinate length of administrative proceedings. In order to fully apply all of the European principles, the preparation of the new LGAP started in 2006. The first steps were taken within CARDS 2003 project "Support to the Reform of State and Public Administration in Croatia". The Government adopted the Guidelines for drafting the new law in 2007. The first draft of the new LGAP was prepared in 2008 and the Law was adopted in Parliament in 2009 (Official Gazette 47/09). An eight-month-*vacatio legis* was allowed for preparing the implementation of the new Law. The Law entered into force on 1 January 2010 (Koprić and Đulabić, 2009; Koprić, 2009; Koprić, 2010).

The main objectives of the new LGAP have been to simplify the administrative procedure, to enhance procedural efficiency and speed up the proceedings by using the modern administrative, information and communication technology, to harmonise with the European *acquis communautaire* and administrative standards, to strengthen citizens' rights, and to protect the public interest. In spite of these laudable objectives, the LGAP strongly follows the old Yugoslav and Austrian legacy.

The 2009 LGAP is somewhat shorter and consists of 171 articles (compared to the previous 290), divided into four main parts. Its scope of application has been widened considerably. It applies to all administrative matters (Art. 3/1). Besides that, it also applies to any other actions of public law bodies in the field of administrative law, when this has a direct effect on the rights, obligations, or legal interests of parties (Art. 3/2); to the conclusions of administrative contracts (Art. 3/2); and to the proceedings of public service providers when they decide on the rights, obligations, or legal interests of the parties (Art. 3/3). The widening of LGAP implementation strengthens citizens' rights considerably. The LGAP is a general law, applied by any central and

other state bodies, units of local and regional self-government, and legal entities vested with public authority, including public service providers.

Following the modernization path, a number of new institutes have been introduced to the Croatian legal system. Along with the basic principles (legality, aid to the party, establishing the substantive truth, independence and free assessment of evidence, efficiency and cost-effectiveness, access to data and data protection, protection of parties' previously acquired rights, right of appeal, and usage of official language and script), the new principle of proportionality has been introduced together with the previously missing definition of administrative matter, which led to a rather restrictive interpretation and, consequently, to limited legal protection of citizens. The institute of one-stop-shop has been introduced in order to enable the parties to file all their requests at a single administrative place. One way of increasing the efficiency of administrative process is the use of electronic communication as well as electronic delivery which is now regulated by the LGAP. In addition, the concept of administrative contract has been regulated for the first time. Croatia has also modernized the system of legal remedies, eliminating a number of extraordinary legal remedies and inserting a completely new remedy – administrative complaint, which can be used when there is no administrative act, but also in the cases when public service providers break some of the parties' rights. Changes have been made also in respect to alternative dispute resolution since the Law regulates a possibility that two or more parties conclude a settlement. A step forward in enhancing the parties' right and in acceleration of the process is the existence of presumed adoption of a party's request in case there is a "silence of administration" and there is a special law allowing this presumed adoption.

The new Law on Administrative Disputes (OG 20/10) was adopted two years later, coming into force in 2012. Since then the system of administrative justice has been organized as a two-tier system with four administrative courts of first instance and the High Administrative Court which as a rule decides on the appeals filed against first instance administrative court decisions.

(B) The previous LGAP had a subsidiary character which means that it had to be applied only if there was no other, special law containing procedural rules. The consequence of this regulation was the flourishing of laws which contained special provisions and derogated the use of the LGAP. In 2010, there were more than a hundred such laws. This situation makes the comprehension of procedural rules difficult for citizens and indicates overbureaucratization of public administration.

The new LGAP clearly states that it is a general law applicable to all proceedings in all administrative matters. There is still a possibility for special laws to regulate some procedural issues differently from the LGAP but this is possible only under strictly regulated conditions (Art. 3/1). a) Only particular issues of administrative procedure can be regulated differently, b) different regulation has to be necessary for proceedings in a particular administrative area, c) different regulation of a particular issue cannot be contrary to the basic provisions and purpose of the LGAP, and d) different regulation has to be prescribed by a special law and not by means of secondary legislation. This strict regulation has stimulated changes in the Croatian legislation since numerous laws have been changed in order to comply with the 2009 LGAP.

In addition, the LGAP has to be applied not only to proceedings in all administrative matters, but also to administrative contracts, other actions of public bodies in the field of administrative law, and to the proceedings of public service providers when there is no special procedure applied in those areas. This confirms the LGAP as a general law that can be implemented in the whole public administration, and in various types of proceedings.

However, the LGAP itself still contains a number of provisions which state that their implementation is possible only if they are regulated by a special law (e.g. the conclusion of administrative contracts is possible only if prescribed by a special law – Art. 150/1).

(C) According to the Law on General Administrative Procedure (OG No. 47/09) and the Law on Administrative Disputes (OG No. 20/10, 143/12, 152/14), public law bodies in Croatia are state administration bodies and other state bodies, bodies of local and regional self-government units, legal entities vested with public authority, and public service providers.

On the basis of the Law on the Organization of Ministries and Other Central State Administration Bodies (OG No. 150/11, 22/12, 39/13, 125/13, 148/13) the following central state bodies have been established: 20 ministries (*ministarstva*), 4 state offices (*državni uredi*), 7 state administrative organizations (*državne upravne organizacije*). In general, central administrative bodies serve as second instance authorities. However, in many cases special laws prescribe that they are first instance administrative authorities. In addition, there are 20 offices of state administration (*uredi državne uprave u županijama*), one for the territory of each county, which serve as first instance bodies. The City of Zagreb is an exception since the transferred state administration tasks are performed by the City of Zagreb administrative offices.

Croatia is divided into 428 municipalities (*općine*) and 127 towns (*gradovi*) as the units of local self-government, and 20 counties as the units of regional

self-government. The City of Zagreb has the powers and duties as both the city and the county. Political-administrative apparatus of the local and regional self-government units includes the representative body, the mayor, and the administrative bodies.

Legal entities vested with public authority are also engaged in administrative procedures. This category of public law bodies comprises mainly regulatory and executive public agencies (75), as well as many other organizations. There are numerous public service providers of economic and no-economic public services (services of general interest), such as telecom companies, electricity and gas providers, public transportation companies, schools, hospitals, etc. at the central and local levels. They are organized as either companies or institutions (*ustanove*), and are controlled by the central or local authorities. The GAPA applies in procedures aimed at protecting parties' rights and legal interests when public service providers decide on their rights, obligations, and legal interests and when no judicial or other legal protection is provided by law (Art. 3/3 of the GAPA).

A two-tier administrative justice system was introduced in Croatia in 2012. It comprises four first instance administrative courts (in Zagreb, Split, Rijeka and Osijek) and the High Administrative Court in Zagreb as the second instance court.

1.8. Conclusions and Recommendations

Western Balkan countries are all engaged with the challenging process of Europeanization either as candidate countries or as potential candidates. Two of them (Montenegro and Serbia) have already started their negotiations with the European Union. Since harmonization with the EU *acquis communautaire* has always been the main accession criterion, along with many more newly developed ones, Europeanization of their legal systems is the basic driver of changes in administrative procedural field.

The EU requires the adjustment of administrative structures of these countries, whose overall result has to be appropriate administrative capacity for effective implementation of the EU *acquis communautaire*. The Directive 2006/123/EC on Services in the Internal Market is but one of the pillars of administrative adjustments relevant to the reform of general administrative procedures. Being monitored as part of EU conditionality policy, and strengthened by the EU's technical assistance, Western Balkan countries are on their way towards modern general administrative laws. Some of them, like

Montenegro, Macedonia, and Serbia, have already taken significant steps in that direction, while others are preparing important changes (Kosovo*, Albania). Submission of the EU membership application in February 2016 will probably serve as a trigger for significant modernization of general administrative procedures in Bosnia and Herzegovina.

The reconceptualization of relations between the state and the citizens according to the countries' new, democratic constitutions has been one of the main inspirations for administrative procedural reforms in the Region. All the countries are searching for a new balance between the protection of the state on the one hand, and human rights and the rights of citizens on the other. In the former Yugoslavia, the main role of the general procedural law was to protect the "public" interest, i.e. the interest of the state, while ensuring a predictable manner of the functioning of public administration was a second-rate task. Now, in the context of newly adopted democratic constitutions, and adherence to the basic international legal documents such as the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the Western Balkan countries are trying to strengthen the legal position of citizens, businesses, civic organizations, and other societal subjects.

For that, almost all the countries are widening the scope of general administrative procedural law in order to cover not only administrative acts but also all other forms of relationships between public law bodies and citizens. These include the so-called real acts, administrative contracts, and the provision of services of general interest. Along with that, better definition of administrative matters, new legal remedies (complaint) and redefined legal remedies (reopening of the proceedings at the request of a party), more limited possibilities of *ex officio* interventions into valid administrative acts, reduced number of deviations from general administrative procedures, as well as restructured administrative justice systems in line with the standards from the European Convention of Human Rights serve as the cornerstones of the new modern system of protecting citizens' rights in their relations with public administration.

The main recommendations are:

1. Take legal remedies as an element of the new system of protecting citizens' rights in their relations with public administration. Be aware that legal remedy is only that possibility which is in the hands of the citizen, while all other *ex officio* instruments are not "legal remedies" but the forms of intervention of public law bodies into administrative acts, mainly to correct the errors made by public administration. Such interventions have to be limited to the appropriate deadlines after

expiration thereof there is no justification for the state to have further opportunity of correcting its own errors.

2. It is very important to widen legal protection of citizens, businesses, civic organizations, and other societal subjects against all possible forms of public administration actions, including real acts, administrative contracts, and the provision of services of general interest.
3. If legal protection of citizens is to be widened effectively, appropriate adaptations of administrative justice have to be regulated and implemented. Because of that, and because of need to better adapt to the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms and to the standards of other relevant international legal documents, administrative justice systems of the countries in the Region have to be thoroughly reformed.
4. It is advisable to suppress overgrowth of special procedures at the expense of general administrative procedure. Further, it is necessary to reduce the number of special procedures that deviate from general rules. All these measures are essential for protecting equal procedural rights, fostering predictability of public administration functioning, and strengthening the rule of law. The rest of necessary special procedures have to be harmonized with the new general procedural laws which follow the European standards be they established as part of hard, soft, or case law, in the shortest possible period.
5. The position of citizens may be significantly improved through the regulation of e-government and e-administration solutions based on the application of modern ICT in public administration.
6. It is necessary to establish a general administrative procedural law as the main piece of legislation in the administrative procedural field, and treat this general law as a part of the constitutional arrangements for public administration in a country. Only in that case it will have strength to cause the necessary administrative reforms and to improve legal protection of citizens' rights.
7. For the protection of citizens' rights, it is important to make administrative procedural institutes and provisions as simple as possible, to reduce the level of formality, to rethink all the provisions from the standpoints of basic values and principles such as efficiency and protection of citizens' rights, and to codify all the general administrative procedural rules in a single, well-structured law.
8. Establishment of the efficient monitoring system of administrative procedural law implementation has to create a new tool, possibly based on new IT solutions, for receiving, gathering, analysing, interpreting, and evaluating the results from the administrative practice. Such evaluations may be used for improving administrative

procedural law implementation in contemporary complex public administration systems.

9. For better results in implementation, massive and thoughtfully designed in-service training of civil servants is of crucial importance. Moreover, public campaigns aimed at informing citizens and other subjects are necessary. Establishing closer relations with academia and including the new institutes and ideas in the study programmes for legal and administrative professionals are needed for producing better outcomes and impacts of new administrative procedural legislation.

2. DEVELOPMENT OF LEGAL REMEDIES SYSTEM BY LGAP – TRADITIONAL AND NEW

- A) Development of the system (changes in types and kinds of legal remedies, re-design of legal remedies, key reasons for changes of legal remedies, expected impacts of the new system of legal remedies),
- B) Analysis of appeal-like (regular) legal remedies in administrative procedures (appeal, complaint, reopening of the procedure and other types).

2.1. Albania

The topic of legal remedies and judicial review is of special importance since the European Commission consistently assesses Albanian regulation and its implementation as too formal and not fully compliant with the rule of law.

The Albanian CAP of 1999 – valid until the new 2015 CAP enters into force in 2016 – has several provisions on legal remedies. However, the 1999 CAP has already been amended so as to follow the EU recommendations with regard to legal protection and modification of administrative acts, especially by full adjustment of administrative remedies and the revocation of the act (see Apelblat, 2011: 15).

Special attention is devoted to enhancing the system and regulation of administrative dispute proceedings and administrative judiciary, based on Art. 42 of the Constitution. Before filing an appeal to the administrative court, the party will normally be expected to have exhausted any available forms of internal administrative review (see Art. 137 of the 1999 CAP and Art. 130 of the 2015 CAP²⁰). Administrative dispute proceedings include two instances,

20 The 2015 CAP, Art. 130: „Exhaustion of the respective administrative appeal remedy is a precondition for bringing a lawsuit to the competent court for administrative matters, unless:

- a) the law does not provide a higher body for bringing the administrative appeal, or when the highest administrative body is not constituted;
- b) the law has expressly provided the right to appeal the administrative action directly to the court;

stipulated by the Constitution (Art. 43). Final judicial control is exercised by the Constitutional Court (Constitution, Art. 115).²¹ However, judicial review is limited to the control of legality of administrative acts.

All these changes are the result of Europeanization process that intensified after acquiring the candidate country status in 2014. Europeanization has been assisted by SIGMA and the Venice Commission. Modifications are based *inter alia* on the ECtHR jurisprudence, explicitly cases Qufaj & Co v. Albania (2/10/2003; regarding execution of court decisions), Bajrami v. Albania (12.12.2006; in child affairs), Driza v. Albania (12.10.2007; on due process), Dauti v. Albania (3.5.2009; that has led to reform of social support institutions), etc. (details in Meça, 2014: 188–192).

According to the 1999 CAF, the emphasis is on the basic principle of internal and judicial review (Art. 18), guaranteeing legal remedies, and on judicial protection of civil matters (administrative justice has been organised in courts since November 2013). Almost identically (except for special administrative judicial review), there is “administrative and judicial control principle” set by the 2015 CAP (Art. 15).²²

Provisions on legal remedies in the 1999 CAP can be found in several sections of Part VI on Administrative Activity:

- Section III on invalidity of administrative acts in Art. 115–120;
- Section IV on abrogation or revocation of respective acts in Art. 121–126, and
- Section VI on the administrative appeal in Art. 135–146.

Pursuant to the 1999 CAP (Art. 115) invalid acts can be absolutely (acts issued in flagrant violation of the law according to Art. 116, such as lack of jurisdiction or those in contradiction with the form and procedure required by law) or relatively invalid (acts issued in violation of the law according to Art. 118). For absolutely invalid acts, no procedure is required, since they

c) the highest organ in reviewing an administrative act, by its decision, has violated the personal or legitimate interests of a person who was not a party in administrative proceeding.”

21 The Constitutional Court is exceptionally competent for certain individual decisions, for instance pursuant to Art. 115 of the Albanian Constitution in the case of dismissal or dissolution of local bodies by the Council of Ministers.

22 The 1999 CAP, Art. 18: „In order to protect the constitutional and legal rights of individuals, administrative activity will be subject to: a) internal administrative review in accordance with the provisions of this Code concerning administrative appeals; and b) judicial review in accordance with the provisions of the Code of Civil Procedure“. The 2015 CAP, Art. 15: „In order to protect the constitutional and legal rights, the administrative activity shall be subject to: a) the administrative control, in accordance with the provisions of this Code on administrative legal remedies and the legislation in force; and b) the court control in accordance to the legislation in force.“

have no legal consequence, regardless whether they are declared null or not. The interested party may request at any time that an act be declared absolutely invalid. In case an act is valid, but is deemed to be inaccurate or with obvious mistakes, the competent body, without any time limits, corrects the essential mistakes as well as obvious irregularities of its own volition or upon request of the parties to the procedure, without changing the content of the act (Art. 120).

In general, the CAP of 1999 distinguishes internal (administrative) and external (judicial) control (to stress the new system as opposed to the communist area). The first one is based on parties' motion or *ex officio*. It is exercised by authorities that issue administrative acts by themselves, by superior administrative bodies, and special bodies competent to deal with specific issues (such as professionalism, efficiency, conflict of interests) as enacted by law (High State Control). In most forms of internal control there is broadened review, incorporating control of legality and regularity or appropriateness of administrative acts.

With regard to the administrative appeal, its character is regulated as "internal administrative control". It is admissible against individual administrative acts or in the case of administrative silence, rarely also in the case of real acts, since they are not supposed to cause direct legal effects (Çani, 2014: 152, etc.). An appeal is not permitted against administrative contracts, which can be challenged as bilateral acts only in front of the court.

The 1999 CAP gives *locus standi* to file an appeal to interested subjects, which includes interested parties as well as affected third persons.

With regard to appeal, the CAP 1999 first lists general provisions, stating basic rules. Appeals are in general treated through a formal or informal request (Art. 135, 136 and 137). If the request is informal, it is more about reconciliation between authorities (or individual public servants) and parties, so there are no formal prerequisites (like deadlines, see Art. 136). If the request is formal, however, there are formal requirements to be taken into account. The aim of the formal appeal as well as of judicial protection is to ensure the respect of fundamental rights of individual parties in terms of due process, as decided by the Constitutional Court (no. 30, 28/12/2006).

In Albania, procedural prerequisites for an (formal) appeal are similar to all detailed LGPAs in the Region (OECD, 1997). There are formal requirements to be fulfilled by the appellant (written, explicitly stated reasons for the appeal, Art. 144). Further, there are time limits. An appeal shall be submitted one month after notification about the administrative act or, in the case of administrative silence, after expiry of the deadline to issue an act (Art. 140),

which is generally three months from submission of the application. Appeal proceedings in the latter situation start three months after initiation of the first instance proceedings if an action is omitted. Additionally, there is a possibility to reject an appeal that is *prima facie* not in violation of law (Art. 144).

The appeal has a suspensive effect except in the cases pursuant to Art. 138 (tax collection, police measures, and measures concerning public order, public health, and other public interests as prescribed by law).

Besides the suspensive effect, a formal appeal has a devolutive or non-devolutive effect unless special laws stipulate differently (Art. 136–139). However, the appeal has to be submitted to an issuer first in order to conduct a formal review. This body also decides on merit pursuant to Art. 142. However, there is a devolutive effect if the first instance body rejects the appeal (Art. 144).

The appellate authority is obliged to decide within one month (Art. 141), having mandate to find the appeal unreasoned, to revoke (abrogate) the decision, or to amend (modify) the decision challenged by the appellant's request either partially or as a whole (Art. 135). In case of administrative silence of a second instance body, the party to the procedure has a right to pursue the matter in the court.

The 2015 CAP has introduced some new solutions, simultaneously retaining certain provisions of the 1999 CAP. In both Laws amendments to administrative acts, but only individual ones, are regulated in chapters on Administrative activities. The 2015 Law regulates them:

- in Part V, Section 3, on Legality, invalidity and corrections of the administrative act, namely Art. 107–112, and Section 4 on Annulment and revocation of an act, Art. 113–119;
- in Part VI on Administrative remedies, Art. 129–147, Chapter II on the appeal (Art. 131–141), Chapter III on a new remedy of administrative objection, Art. 142–144, and Chapter IV on review, Art. 145–147.

Legal protection with regard to administrative contracts is regulated by the Civil Code and provided by courts.

There are three remedies involving administrative appeal *sensu stricto* (without *ex officio* annulment and revocation, Art. 113–119) in the new Law (Art. 129 *et seq.*): (1) the administrative appeal, (2) the administrative objection, and (3) revision (reopening of a proceeding).

Again, this is only in the case of valid acts since absolutely invalid acts (Art. 123) do not have any legal effects as they have been issued as a

consequence of a fraud, threat, bribery, conflict of interest, counterfeit, or any other criminal offence, and may thus be handed over to the criminal justice system. However, absolute invalidity of the act may be declared at any time, either ex officio or upon request of any interested person. Invalidity can be declared by the public body that has issued the act, its superior body, the body competent to review the administrative appeal, as well as the competent court, in accordance with the law. Contrary to the 1999 Law, the competent authority is obliged to declare the absolute invalidity of the administrative act. Remedies are then applied against valid acts deemed unlawful (see Art. 110).²³

With regard to the administrative appeal, the 2015 CAP defines only formal remedy²⁴ for acts deemed unlawful before their completeness (see Art. 90), or in the case of administrative silence.

The 2015 Law regulates deadlines almost equally to the 1999 CAP (one month), setting them within 30 days. For administrative silence, the deadline is defined better than before. The appeal must not be filed earlier than seven days and no later than sixty days from the date of expiration of the set or extended deadline for the completion of administrative procedure if the parties to the procedure have not been notified about the extension, or from the date of expiration of the extended deadline.

The appeal has a suspensory effect except in the situations enumerated by the 1999 Law (Art. 134). Appeal can be devolutive or non-devolutive, same as in the 1999 Law, with more detailed provisions on the competences of first instance and appellate/superior administrative body (Art. 137 and 138).

A novelty of the 2015 CAP is a special remedy called complaint (Art. 142–144), coming into effect in case of administrative complaint against other administrative actions, not against an individual administrative act, but regarding the indirect performance of public services. The party may require

23 An administrative act is unlawful when:

- a) the issuing public body acted without having the competence;
- b) it came into being through the infringement of provisions regulating the administrative procedure;
- c) it contradicts the provisions regulating the form or the compulsory elements of the administrative act;
- d) it was issued without authorization by a law, according to Article 4, paragraph 2 of this Code;
- e) it violates substantive law;
- f) is a result of the discretion that was not lawfully exercised, or
- g) it does not comply with the principle of proportionality.

24 Pursuant to Art. 132 of the 2015 CAP: „any request addressed to the public organ shall be assessed as administrative appeal, even if it is not entitled as such in the law ...“

different things.²⁵ The CAP 2015 defines a deadline of fifteen days from the day the party has become aware of the fact against which they complain (Art. 143). The remedy is devolutive as it initiates the exercise of regulatory functions or supervision by the regulatory, supervisory, or licensing body, in order to ensure that the complaining party gain benefit from a service granted by law. The decision shall be issued within 30 days from the date of submission. A direct lawsuit may be filed against this decision in the court competent for administrative matters.

Revision (reopening of the proceedings) is regulated somewhat differently than in the 1999 Law. Revision is a legal remedy for requesting the annulment or amendment of an issued administrative act, or the issuance of an administrative act that has not been issued due to silence of administration against which an appeal is not possible because the deadline has expired (Art. 145). Revision is a remedy that can be initiated only by a party to the procedure.

Revision may be initiated if new written evidence or other circumstances relevant to the case are discovered that were not known during the conduct of the administrative procedure. Revision may be requested no later than 30 days from the date when the party found out about the grounds for revision (subjective deadline). The objective deadline is two years from the date when the grounds for revision occurred. Reopening is granted only if the competent authority has decided that the administrative act would be unlawful if issued in the current circumstances. The authority may annul or amend the act, or issue the act that has not been issued due to administrative silence.

New regulation is rather similar to the previous Law. Introduction of revision is an important novelty. However, the most important novelty is the complaint – a completely new legal remedy in the field of public services.

There are no statistical data available on the quantity and quality of administrative procedures and the usage of legal remedies and administrative disputes. Further, there are no illustrative cases in English. No information is available on the existence and operation of inspectorates and other forms of supervision. Consequently, empirical analysis is not possible. However, there is evidence about post-communist distrust in citizens' relations with public administration (OECD, 1997).

25 The 2015 CAP, Art. 142: „... the party may require from the public body: a) ceasing of the performance of another administrative action; b) the performance of another administrative action to which the party is entitled, if such action has been required by the party but the public organ has failed to act; c) the withdrawal or amendment of a public declaration; or d) the declaration as unlawful of another administrative action and the rectification of its consequences.“

2.2. Bosnia and Herzegovina

In Bosnia and Herzegovina, there are no explicit constitutional provisions providing the right to appeal or other legal remedy at the state level. However, the rights and freedoms provided by the European Convention on Human Rights and its Protocols (including the right to an effective remedy) (the Convention) have a priority and are directly applied by all courts, institutions, bodies vested with state powers and other bodies in BiH and its entities (Art. 2 of the BiH Constitution). Article 6 of the FBiH Constitution stipulates the obligation of all courts, bodies of administration, institutions vested with public authority and other bodies of the federal government to respect the rights and freedoms of the Convention. The right to appeal and to other legal remedies against the decision on the right or legally bounded interest is explicitly stipulated by the RS Constitution (II Human Rights and Freedoms, Art. 16/2). There are two additional constitutional provisions granting the right to appeal or other means of protection of rights and legality (III Constitutionality and Legality, Art. 111 and 113). Art. 113/4 also stipulates judicial review [of final individual decisions] within the administrative dispute except in specific cases when other forms of judicial protection are provided or administrative dispute is excluded by law.

The basic principle of the right to appeal is stipulated at the beginning of all (G)APAs. The provisions thereof are almost identical, granting the right to appeal against first instance decisions (if not otherwise prescribed by law). Furthermore, an appeal can be filed in case of administrative silence. The right to appeal can be excluded only by law if another form of the protection of rights and legality is ensured.

All (G)APAs stipulate only one regular legal remedy – the appeal – which can be filed by a party, state prosecutor, state attorney and other bodies authorized by law. Additionally, there are six (in the FBiH and RS seven) extraordinary legal remedies that can be filed by a party to the procedure, ex officio and/or state attorney, ombudsman or other representatives of the public interest. The systems of legal remedies have been transferred from the former Yugoslav system almost entirely, and have not had any significant changes so far. In general, they differ from one another only in relation to bodies authorized to take a decision. The FBiH APA and RS GAPA still incorporate an extraordinary legal remedy called the request for protection of legality, abandoned in other countries in Region as obsolete and seldom used in practice.

Like other countries whose systems of administrative procedure and justice are based on the Austrian model, Bosnia and Herzegovina and its entities

apply a mandatory system of administrative appeals and consider the appeal to be a prerequisite for successful initiation of judicial review.

The ordinary sequence of activities in administrative matters is as follows:

- first instance administrative proceedings (depending on the jurisdiction, the proceedings are initiated before various bodies and on the basis of different (G)APAs valid in BiH);
- second instance administrative proceedings (if initiated upon the appeal filed by a party or a representative of the public interest), they result in final and enforceable decisions;
- administrative dispute initiated against a final decision made in second instance administrative proceedings (or first instance when the right to appeal is excluded) by a party, a representative of the public interest or an ombudsman; an extraordinary legal remedy (with the exception of BD where the appeal in administrative dispute is possible) can be filed against the final decision passed in judicial review by various competent courts (the Court of BiH, the Supreme Court of the FBiH and cantonal courts in the FBiH, the Supreme Court of the RS and district courts in the RS, the Court of Appeal in BD);
- protection of the rights and fundamental freedoms guaranteed by the BiH Constitution in the Court of BiH (citizens can request protection when their rights or freedoms are violated by final individual act passed by the ministries of Bosnia and Herzegovina and their bodies, public agencies, public corporations, Commission for Real Property Claims of Displaced Persons and Refugees, institutions of the Brčko District, and other organizations determined by the law of the State and vested with public authority which are under jurisdiction of Bosnia and Herzegovina as prescribed by the Constitution, when no other form of judicial protection is guaranteed) and further before the ECHR.

All of the (G)APAs have placed the provisions on the appeal in Part III on Legal remedies (Chapter A on regular legal remedies) as follows: Art. 213–237 (BiH APA), Art. 221–245 (FBiH APA), Art. 211–233 (RS GAPA) and Art. 208–229 (BD APA).

The BiH APA and the FBiH APA explicitly stipulate the right to appeal against the decisions passed by state bodies of administration and institutions vested with public authority, federal bodies of administration and federal institutions, and cantonal bodies of administration and cantonal institutions, shall be regulated by specific sector laws.

An appeal can be filed by a party to the procedure, state prosecutor, state attorney, and other bodies authorized by law. Additionally, the BiH Ombudsman

can file an appeal when citizens' rights and freedoms guaranteed by the BiH Constitution, the Convention, and instruments stipulated in Annex 6 of the General Framework Agreement, are violated by the decision (Art. 213/3 of the BiH APA).

With regard to the right to an effective legal remedy, the BiH and FBiH APAs stipulate the right of appeal (to be ensured by specific sector laws) which can be excluded only on particularly justified grounds. The appeal is explicitly excluded against decisions passed by the bodies of state/federal/cantonal power. However, if appeal is excluded, the decision can be challenged in the administrative dispute. Appeal is granted in all the cases when administrative dispute is excluded by law. This is not in line with the principle of separation of powers and the right to judicial review cannot be replaced by the appeal within administrative procedure.

The appeal has suspensive effect until the decision passed in second instance procedure is delivered to the parties. Exceptionally, the decision can be executed during the appellate proceedings.

In general, the appeal is a devolutive legal remedy. However, bodies that issue the decisions in first instance procedures may perform formal review of appeals, and decide on the merit under certain conditions. Parties to the procedure have the right to appeal against the rejection of the appeal as well as against the decision on the merit issued by the first instance body after the appeal has been submitted.

The appellate procedure can be instigated only by a party or a public interest representative authorized by law. Accordingly, the appeal is a dispositive legal remedy. However, appellate bodies perform *ex officio* examination of the violations that make the decision null and of the jurisdiction of first instance bodies. Furthermore, appellate bodies can modify the decisions beyond the assertions stated in the appeal (within the limits of the request filed in the first instance administrative procedure) in favour of the party, but also against the appellant's interests if particularly significant errors have occurred in the first instance procedure. The latter include the violations making the decision null, and those representing the basis for the usage of two extraordinary legal remedies: the annulment and repeal of decision through the supervisory right, and extraordinary repeal of decision.

Procedural prerequisites that have to be fulfilled relate to admissibility of appeal, time limits, and legitimacy of its submission. An appeal may be submitted 15 days after the notification about administrative act, if not otherwise prescribed. In the case of administrative silence, an appeal can be submitted after the deadlines for the issuance of decision expire.

The appeal has to name the decision that is being challenged and the reason why it is being filed, but no special explanations are required. Most (G)APAs do not explicitly stipulate the reasons for challenging a decision. However, the provisions on possible decisions of the second instance body imply three broad groups of reasons the appeal can be based on. These include the violation of procedural rules, incorrect and incomplete establishment of the state of facts, and the violation of substantive law. A special article explicitly prescribing the reasons for challenging a decision by the appeal was incorporated into the BiH APA in an amendment of 2009. Besides the three main groups of reasons, the amendment stipulates seven errors pertaining to the group of substantive violation of procedural rules. Procedural errors relate either to the subjects of administrative procedure (administrative body and party) or to the administrative act, and comprise the following: jurisdiction for subject matter, the right to participate in the administrative procedure, the right of the parties to declare themselves, proper representation, communication in official language, impartiality of officials, and the form of the decision that allows verification. However, the appeal is denied if a minor procedural error that has not affected the decision has occurred, and in the case of incorrect reasoning of the correct operative part of the decision. An appeal can be lodged if administrative silence has occurred, i.e. if the decision on the party's request has not been issued by the prescribed deadline (15, 30 or 60 days, depending on the complexity of the procedure).

The appellate authority may dismiss the appeal as inadmissible and as filed too late or by an unauthorized person. It can reject the appeal as groundless, partially or completely cancel the administrative decision, or modify it. When the second instance authority annuls the first instance decision and returns the case to the first instance authority for reopening, the latter is obliged to comply fully with the second instance decision. In order to ensure this provision is respected as well as to protect the public interest and the parties' interest, the BiH APA and the RS GAPA have been amended. Namely, the second instance authority shall annul the new decision issued by the first instance authority and decide on the subject matter if the first instance authority has not respected its legal understanding (Art. 230/3 of the BiH APA and Art. 227/3 of the RS GAPA). Furthermore, it will announce the administrative inspection thereof in order to conduct the offence procedure (Art. 230/4 of the BiH APA and Art. 227/4 of the RS GAPA).

The decision in the appellate procedure has to be issued as soon as possible, but no later than 30 days (pursuant to the BiH APA, FBiH APA and BD APA) or two months (pursuant to the RS GAPA) from the date of filing the appeal. The first instance body is obliged to deliver the decision passed

by the appellate authority to the parties in five days (or eight in the RS) after receiving the decision from the appellate authority. Compared to previous regulation, the deadlines are shortened by a month for the issuance of the decision and by three days for the delivery thereof, except in the RS GAPA which retained the former limits.

Reopening of the procedure is another legal remedy at parties' disposal, but it may be also requested by the state prosecutor and BiH Ombudsman, and ordered ex officio by the body that has issued the decision. All (G)APAs in Bosnia and Herzegovina have taken over the provisions on reopening of the procedure from the Yugoslav GAPA, some of them with slight amendments.

An administrative proceeding may be reopened only if no regular legal remedy is available. The (G)APAs explicitly stipulate 11 reasons for reopening of the procedure related to new facts and evidence, grouped as follows:

- a) new facts have become known or a possibility for using new evidence has been found or has arisen which, on their own or in connection with the already presented and used evidence, could have resulted in a different decision had such facts or evidence been given or used in the earlier procedure;
- b) preliminary issues – the decision was based on the court ruling in the criminal or civil procedure, which has subsequently been revoked by a valid court decision; the decision of the authority conducting the procedure was based on the preliminary issue whose resolution by the competent authority was substantially different;
- c) forgery – the decision has been adopted on the basis of a false identification document or false testimony of a witness or an expert witness, or it has resulted from other actions sanctioned under the criminal procedure law; the decision in favour of a party was based on the party's false allegations misleading the authority that conducted the procedure;
- d) basic principles of representation, use of language, and authorization to participate in the proceedings – the officer who should have been excluded in accordance with the law has been involved in the decision-making; the decision has been adopted by the unauthorised officer; the collegiate authority that adopted the decision was not composed as required by law or the decision was not voted for by the prescribed majority; the person supposing to participate in the procedure in the capacity of a party was not given the opportunity to do so; the party has not been represented by their legal representative; parties to the procedure have not been allowed to use their language.

Parties to the procedure may request its reopening within one month after they become aware of the reason for reopening (subjective deadline), but no later than five years from the date the decision was served on the parties

(objective deadline). Reopening may be exceptionally be requested or initiated after the period of five years on specific grounds stipulated by the (G)APAs.

As a rule, the request for reopening of the procedure does not have a suspensive effect, but the authority responsible for deciding on the request may decide to stay the enforcement of the final administrative act until the decision on reopening has been issued. However, the conclusion authorising the reopening has a suspensive effect and stays the enforcement.

Reopening of the procedure is a non-devolutive legal remedy since the body that has issued the final decision is authorized to decide on request for reopening.

The circumstances on which the request is based have to be credible. For example, when the request is not submitted in due time and by authorized person, the competent authority is obliged to refuse it. The proceedings will be reopened only if the authority concludes that the evidence or circumstances given as cause for reopening are such that they could lead to a different decision. If not, the request for reopening will be rejected. In order to permit the reopening of the procedure and to determine its extent, the authority issues a special decision (a conclusion). Only the RS GAPA (amended in 2010) explicitly prescribes the deadline for deciding on the request for reopening of the procedure (30 days from filing the request). However, the other APAs incorporate several provisions on correspondence between the first and second instance bodies in determined periods, which are not included in the RS GAPA. Obviously, the intention of the legislators was to speed up the process of deciding on the request for reopening, which is a kind of novelty in comparison to the old Yugoslav GAPA. Based on the previous information and reopened procedure, the authority may confirm the decision which has been the subject of reopened procedure or replace it with a new decision.

Statistical data on administrative procedures and legal remedies filed in BiH, its entities, and the BD are not available, which makes it impossible to conduct an empirical analysis. However, the bodies engaged in administrative procedure according to the BiH APA are obliged to keep the official records on deciding in administrative matters and to submit the report thereof to the Ministry of Justice (Administrative Inspectorate). Based on the data collected from the bodies of administration and institutions vested with public authority, the Ministry of Justice prepares the annual report and submits it to the Council of Ministers of Bosnia and Herzegovina (Art. 285 of the BiH APA). Prompted by the 2014 Report, the Council of Ministers has ordered the Civil Service Agency and the Administrative Inspectorate to organize necessary in-service trainings and to conduct supervision over the bodies that have

not submitted the required reports. In Brčko District, the Mayor is obliged to submit a report to the BD Parliament on deciding in administrative matters of all BD bodies (Art. 277 of the BD APA).

The data on the number of cases of administrative dispute in the BiH courts in 2010, 2011 and 2012 (Kulenović) show there were:

- 3,254 cases in the Administrative Department and 412 cases in the Appeal Department of the Court of BiH, 3,666 in total;
- 17,602 cases in cantonal courts and 2,083 cases in the Supreme Court of the FBiH, 19,685 in total;
- 9,212 cases in district courts and 1,446 cases in the Supreme Court of the RS, 10,658 in total;
- 325 cases in the Principal Court and 274 cases in the Court of Appeal in the BD, 599 in total.

Accordingly, there were 34,608 administrative dispute cases in Bosnia and Herzegovina in the selected period, meaning that some 11,536 cases are opened each year based on suits and legal remedies against court decisions.

2.3. Kosovo*

The right to legal remedy²⁶ is one of the main principles regulating the administrative procedure in Kosovo*. It is regulated in Art. 13 of the Chapter on basic principles in Part I of the 2015 Draft Law. There is no similar provision in the LAP of 2005. An analysis of the right to legal remedy from the Draft LGAP of 2015 shows that there are some basic elements of that right originating from Art. 13:

- An individual whose subjective rights or legitimate interests are affected by administrative action or omission of such action has the right to legal remedy.
- Legal remedies can be lodged with an administrative or judicial body, which shows the natural connection between administrative procedure and the system of administrative justice.
- The use of legal remedies is stipulated by law and the use of the particular legal remedy can be excluded only by law and not by subsidiary legislation.

26 „Except when explicitly excluded by law, any person has the right to use the legal administrative and judicial remedies, as provided by law, against any administrative action or omission, which affects their subjective right or legitimate interests.“ (Art. 13 of the 2015 Draft LGAP of Kosovo*)

Part VII of the 2015 Draft is titled Administrative remedies and contains 18 articles (124–142). It is organised in four chapters which regulate general rules regarding administrative legal remedies (Art. 124) and the three main legal remedies: administrative appeal (Chapter II, Art. 125–135) and administrative complaint (Chapter III, Art. 136–139) as regular legal remedies and reopening of the procedure (Chapter IV, Art. 140–142) as an extraordinary legal remedy. With such a structure of legal remedies, the 2015 Draft LGAP follows a new approach to legal remedies applied in Western Balkan countries, which have already adopted new LGAPs. Although the number of legal remedies is smaller in comparison to the previous Yugoslav GAPA, the Draft covers more activities of administration. The appeal is oriented towards the classical administrative activities such as administrative act or absence of its issuing (administrative silence). For other administrative actions, e.g. real acts and administrative contracts, there is a new legal remedy called administrative complaint. There is only one extraordinary legal remedy (reopening of the procedure), which is a significant departure from the tradition of regulation of administrative procedure on the territory of the former Yugoslavia.

A request for legal remedy may be filed on the grounds of unlawfulness of an administrative action (Art. 124/2). Filing a request for legal remedy is a necessary precondition for administrative dispute before the competent court (Art. 124/6). The 2015 Draft LGAP uses the term “administrative legal remedy” to distinguish between remedies that can be lodged with public administration in the course of administrative procedure from the lawsuit that can be filed in court in the course of administrative dispute.

The system of legal remedies as regulated in the 2015 Draft LGAP is not significantly different from the 2005 LAP, especially regarding the number and logic of legal remedies. The LAP of 2005 stipulates the appeal and complaint as two main legal remedies. Despite that, the system of legal remedies has been assessed as “only partially developed and inconsistent and per consequence not effective” (SIGMA, 2012: 6). The LAP of 2005 has not regulated reopening of the procedure. The Draft Law of 2015 regulates legal remedies much more systematically and logically, covering all aspects of public administration functioning, classical authoritative decision-making that results in administrative acts, as well as other actions of modern administration that have potential effects on the rights, obligations and legal interests. These include administrative contracts, real acts of public administration, provision of public services by the private sector, etc.

The system of administrative justice is essential for the realisation of the right to legal remedy. The Kosovo* Assembly adopted the Law on Administrative

Conflicts (Law No. 03/L–202, 16 September 2010) which regulates the system of administrative justice. Once it has been adopted, the 2015 Draft LGAP will require changes of the Law on Administrative Conflicts in order to enable legal protection for all administrative actions (OSCE, 2007).

The main ordinary legal remedy is the administrative appeal (*ankesa, žalba*). It can be filed against an administrative act and against administrative silence, i.e. when administrative authorities “kept silent within the established deadline”. By regulating the matter of administrative silence, the 2015 Draft LGAP has taken a neutral stand towards silence of administration considering it merely as the grounds for legal remedy. This solution should induce continuing of the administrative procedure either by the administrative body to which the request has been submitted in the first place or by the second instance administrative body which will assess the arguments presented in the appeal.

As a rule, procedural actions cannot be challenged by the administrative appeal but by administrative complaint, the second ordinary legal remedy. Procedural actions may be challenged by an appeal only when such possibility has been explicitly stipulated by law.

Administrative appeal has a suspensive effect although the administrative body “that decides on the appeal may decide to stop the suspensive effect if a delay in its enforcement would cause immediate and irreparable damage to the public interest or to the interests of a third party” (Art. 130/3). Due to sensitive nature of the decision, the reasons for stopping the suspensive effect of the appeal must be thoroughly elaborated in order to protect the public from misuse of this institute.

Regarding the appellate procedure, the 2015 Draft distinguishes between the competent body and the superior body, the former being the body that has issued (or failed to issue when there is administrative silence) the first instance act, while the latter is an administrative body “that is superior to the competent organ or ... another public organ provided by law” (Art. 128/1).

Both the first instance body (competent body) and the second instance administrative organ (superior body) play a significant role in the appellate process. The first instance authority may assess the reasons stated in the appeal and if it finds them to be grounded it may a) amend its act, b) annul that act completely, or c) it can issue the act which it has previously refused to issue.

General deadline for filing an appeal is 30 days from the date when the party was notified of the act. The appeal must be decided upon within 30 days

from filing. In case the administrative act has not offered an instruction on legal remedy, the deadline for filing the appeal is extended to three months.

The right to file an appeal can be excluded a) by a special law or b) if the appellant does not have *locus standi* to file the appeal or c) if the appellant does not respect the deadline set for filing the appeal, or due to d) some other reasons enumerated in a special law which exclude the right to lodge an appeal in particular administrative matter (Art. 129/1).

The superior administrative body has several options while reviewing an appeal. It can either confirm the first instance act if it finds it grounded and lawful, or it can annul or amend the contested act or issue a new act that will replace the contested act. The superior body may also give instructions to the competent body on how to prepare a decision.

Compared to the 2005 LAP, the Draft of 2015 regulates legal remedies in a much better and more systematic manner. The 2005 LAP distinguishes between a request to review an act and an appeal. The request is dealt with by the first instance body while the appeal has to be submitted to the higher body, which “in turn may forward the case to the body that issued/refused to issue the act along with its determination for resolution of the case” (Art. 129/3 of the 2005 LAP).

The second ordinary legal remedy is administrative complaint (*kundërshtimi, prigovor*). It is aimed against other acts that cannot be regarded as administrative acts, especially against real acts of public administration that can affect the parties. It has to be noticed that administrative complaint is “aimed at the declaration of unlawfulness of the procedural action or inaction and may be connected with the prohibitory injunction for the future, if there is danger of repeating the mistake. The complaint neither suspends the progress of administrative proceeding, during which the challenged procedural action or inaction has occurred, nor affects the validity of administrative acts and administrative contract respectively issued by the collegial body as the result of this proceeding.” (Art. 136/2 of the Draft LGAP 2015 of Kosovo*)

By filing an administrative complaint, the party may request a) ceasing the performance of a real act; b) revocation or correction of a public declaration, c) declaration of unlawfulness of the real act and elimination of its consequences, d) performance of the real act, to which the party is entitled and has unsuccessfully applied for (Art. 136/1). Administrative complaint may also be filed against “public service of general interest” on the subsidiary principle, i.e. in cases when legal remedy is not provided in the special law regulating a particular service (Art. 136/2, 3). Provision of public services

of general interest is covered by the 2015 Draft LGAP in order to protect public service users when legal remedy is not stipulated by special laws that regulate particular services.²⁷

Regarding the form and technical issues, such as the form and content of the complaint, rules that regulate the appeal apply to the complaint as well.

Deadlines for submitting the complaint are somewhat shorter than for the appeal. The complaint must be “filed within the period of 15 days from the date the party had the opportunity to become aware of the disputed matter but no later than 6 months from its performance, or respectively within the period of 2 months from the submission of request in case of inaction by the public organ.” (Art. 137/3 of the 2015 Draft LGAP). The deadline for deciding on the complaint is also shorter than for the appeal and it is 15 days after filing the complaint.

The third legal remedy in the 2015 Draft is reopening of the procedure (*rihapja e procedurës, obnova postupka*) which is regulated in three articles (Art. 140–142). They regulate grounds for lodging the request for reopening of the procedure (140), deadline by which the request has to be submitted (141), and decision on the reopening (142).

Reopening of the procedure is initiated after the deadline for the appeal has expired, at the request of the party who has become aware that a) the factual or legal situation on which the issuance of the administrative act was based, has subsequently changed in favour of the party; b) new evidence has appeared, which could have been relevant for the issuance of the challenged administrative act; c) the administrative practice for the same or similar administrative cases has changed after the issuance of the challenged administrative act (Art. 140/1).

Reopening of the procedure is bound by subjective and objective deadlines. Subjective deadline is 90 days from the date when the party became aware of the grounds for reopening, while objective deadline is 3 years after the notification of the challenged administrative act.

27 „(1) In cases when public services of general interest are provided either by a public or private service provider under private law, the regulatory, supervisory or licensing body (hereinafter referred to as „regulatory organ“) as provided by law, by exercising its supervisory responsibility shall ensure the continuity, uniformity, affordability, and adequate quality of service, transparency of proceedings and non-discrimination of public service users.

(2) Provision of public services of general interest, under private law, must not lead to poorer legal protection of public service users compared to cases when the service was performed by the public organ under administrative law.“ (Art. 70 of the Draft LGAP 2015 of Kosovo*)

2.4. Macedonia

The system of legal remedies has been reformed in the new LGAP and now there are two legal remedies: the appeal and the administrative complaint. In addition, there is the institute of reopening of the procedure. The 2015 LGAP has modernized the appeal and reopening of the procedure, mostly with the purpose to speed up decision-making and to simplify the process. The administrative complaint is a new legal remedy, introduced with the task to strengthen citizens' protection.

Compared to the previous LGAP, the level of citizens' protection has been widened. Previous LGAP stipulated the right to appeal as one of its basic principles, and the appeal was granted against first instance decisions. The appeal was also allowed in cases when the first instance authority failed to pass a decision regarding the party's request within the specified deadline. In Article 14 (Principle of legal protection), the new LGAP continues to guarantee the right to appeal against first instance administrative acts and in cases when first instance decisions are not made within the deadline. It further stipulates that the parties have the right to file a complaint against real acts, and against the actions of the providers of services of general interest. Since real acts cover all the acts and activities other than administrative acts or administrative contracts (against which protection is also ensured), the new LGAP grants legal protection against any administrative action. In special cases when the appeal against first instance administrative acts is not admissible, or when there is a second instance administrative act, the parties have the right to initiate an administrative dispute.

The appeal is the most important legal remedy that can be filed against first instance administrative acts. The deadline for the appeal is 15 days from the day of its delivery or notification, unless a longer deadline is allowed by special law. The appeal needs to be filed to the first instance body which can dismiss it if it is inadmissible, filed too late or by an unauthorised person. If the first instance body considers the appeal to be fully justified, it can replace the challenged administrative act with a new act. If the first instance body considers the appeal to be admissible, but it does not change the original administrative act, the appeal has to be sent to the second instance body within 7 days (Art. 107). The previous LGAP had a 15-day period for sending the appeal to the second instance body, but the change has been made in order to speed up the process.

In general, the appeal has a suspensive effect, which can be abrogated in case of emergency measures in the public interest, or if a delay in enforcement would cause irreparable damage to the party (Art. 108).

The second instance body can: (a) dismiss the appeal, (b) accept the appeal and annul the first instance administrative act fully or partially, or (c) amend the administrative act. Similar provisions were contained in the previous LGAP. However, in reality second instance authorities avoided deciding on the cases claiming that the first instance bodies could decide on the cases more efficiently because they were better able to find evidence. This led to a huge backlog in the administrative system (Russell-Einhorn and Chlebny, 2006). In order to try to solve this problem the new LGAP has a provision stipulating that the second instance authority may return the same case to the first instance authority only once, irrespectively of the reasons or omissions in the first instance proceedings (Art. 109). In addition, with a view to speeding up the procedure, the Law stipulates that the second instance authority has to decide on the appeal within 60 days. If this deadline is not respected, the party may initiate an administrative dispute.

Apart from the possibility of filing an appeal against first instance administrative acts, it is also possible to appeal when the first instance authority has not issued the act within prescribed deadlines (administrative silence, Art. 111). When such an appeal is received by the second instance authority, it can instruct the first instance authority to decide and set a deadline that cannot be longer than 30 days after the receipt of instruction. If the second instance authority establishes that the reasons for not issuing the first instance administrative act are not justified, it may decide upon it or instruct the first instance authority to issue the act in 15 days. In the case of repeated silence of the first instance authority, the second instance authority is obliged to decide on the matter. The institute of administrative silence was amended in 2008 but the regulation was incomplete. The new regulation specifies more clearly the period in which the administrative act has to be issued and obliges the second instance authority to decide in case of continued administrative silence.

The organization of the second instance authority responsible for deciding on appeals has undergone changes. Until 2011, the second instance proceedings were conducted by the Commission for second instance administrative proceedings of the Government of the Republic of Macedonia. This institution was criticized for numerous reasons. It failed to process the appeals within deadlines and decision-making was frequently performed by the civil servants employed in various ministries instead of Commission members. Members of the Commission were simultaneously office holders who could not devote sufficient time to this task. In an attempt to rectify the situation, the State second instance Commission for decision-making in administrative procedures and labour relations was established in 2011 as an independent institution (Pelivanova and Ristovska, 2014). However, it seems

that this institution has not become functional (European Commission, 2015) and there are still delays in second instance decision-making. The same can be said for the system of administrative justice. According to the European Commission (2015) “efficiency in the administrative courts has increased but there are delays in enforcing court rulings and the appeal procedure remains too onerous.”

Administrative complaint is a new legal remedy which can be used in two situations:

- Against a real act performed by the public authorities or the omission of such acts (Art. 102). Real act is defined as an act or action of the public authority other than an administrative act or administrative contract, which can have a legal effect on the party's rights, obligations, or legal interests. In general, real acts include all acts or actions not considered to be administrative acts or administrative contracts. The parties to the procedure may lodge an administrative complaint against a real act or its omission with the public authority that has or has not performed it, if they claim that their rights or legal interests are violated by those actions or inactions. The complaint procedure will be conducted by a separate organizational unit or a collegial body of the public authority, which has to issue and deliver an administrative act immediately, but no later than 15 days after receiving the complaint (Art. 119).
- Against actions of the providers of services of general interest (Art. 103). Service providers are all legal entities authorised by law to provide public services or services of general interest. Services of general interest must be provided under the following conditions: (a) they have to be accessible to all parties at (b) an affordable price and (c) with adequate quality of the service, (d) in continuity, (e) transparently and without discrimination of the service user. The same applies when services of general interest are provided by private service providers. Users have the right to file a complaint under the following conditions: (a) they have met all the obligations but (b) they consider that they have not received the service of adequate quality, in continuity, transparently, and without discrimination, (c) service provider's action or inaction is still going on and (d) administrative law provides no direct legal remedy against the public service provider for the matter in dispute. The complaint has to be submitted to the supervisory public authority (the public authority executing licensing, supervisory or controlling function over the service provider). This authority has to decide on the complaint by an administrative act, without delay, and no later than 15 days from the submission of the complaint. This administrative act is subject to administrative dispute before the competent court (Art. 120).

The introduction of administrative complaint is an important modernization step in the Macedonian administrative procedural law and its adherence to European standards since it ensures legal protection even when there is no administrative act.

Reopening of the procedure is regulated by Articles 114–116 of the new LGAP. Reopening is possible when the deadline for the appeal against an administrative act has expired. There are 10 reasons for reopening, but it is necessary that there is no fault on the party's side for not using some of those reasons in the former administrative procedure (Art. 11: "if there is no grave fault on the party's side, and the party was unable to present the reasons for reopening in earlier administrative proceedings, particularly by means of a legal remedy, and if one of these reasons would have led to the issuance of a more favourable administrative act, had they been presented in the former administrative proceedings"). Request for reopening of the procedure can be lodged only by the party. However, after expiry of the period of three years from the date when the party was notified of the administrative act, no reopening of the proceeding may be requested.

The present regulation of the reopening has been significantly simplified in comparison to the old LGAP where 12 articles dealt with the institute that was titled (but not regulated) as reopening of the procedure. The deadlines for reopening of the procedure were different and there was a possibility of an *ex officio* reopening which is now eliminated, leaving the request for reopening in the hands of the party. Thus, reopening of the procedure has been reconceptualised as a real legal remedy.

2.5. Montenegro

The new Montenegrin APA of 2014 has introduced not only a new system of legal remedies but also a completely new system of interconnected institutes which ensure a dense network of protection of rights and legal interests of citizens and other subjects in their relations with the state and public administration. It prescribes three legal remedies: appeal, complaint, and reopening of the procedure, building them on the idea that legal remedies are only those possibilities of challenging administrative acts that are in the hands of citizens and depend on the citizens' will. In such a vein, the new Montenegrin APA departed from the Yugoslav legacy which restricted the legal position of citizens and strengthened the position of state bodies. The old Yugoslav legacy of "extraordinary legal remedies" ensured numerous possibilities for state bodies to intervene in an administrative act which was

issued, enforced, and existed in reality for some time, not only as a written document but also as a life fact for citizens, businesses, or other subjects. That did not put legal remedies in the hands of citizens; it was merely an additional and unnecessary increase of the state power.

The new APA of 2014, however, ensures full legal protection of citizens in their relationships with public administration in line with European legal standards, i.e. in all possible situations, not only in those in which public law bodies issue formal written administrative acts. It means that, from 1 July 2016 onwards, legal protection will be extended to all forms of administrative actions, including providing services of general interest and all other actions undertaken by public law bodies where such actions may affect citizens' rights. The Law ensures appropriate and improved legal protection with regard to all these forms of actions within public administration and it provides for appropriate court protection if legal protection inside public administration is not sufficient.

The definition of "administrative matter" thwarts, to the greatest possible extent, a discretionary interpretation of the same issue (what is and what is not an administrative matter) by the public law bodies and courts. The discretion has existed for decades, diminishing legal predictability and the rule of law. There have been disputable situations in administrative and court practice (i.e. in case law) in which the public law bodies and courts denied the existence of the administrative matter, preventing appropriate legal protection (appeals and court protection). According to the new Law, each relationship of citizens, businesses, and other actors with public administration shall be subject to legal regulation of the APA (Art. 2).

The new APA introduces European standards and principles, such as the principle of reasonable expectations of the party, the principle of proportionality, and the right of the party to be heard on the outcome of establishment of facts prior to adopting an administrative act (investigatory procedure, Art. 105–110), through which European law standards and the European Court of Human Right case law are complied with.

The deadlines for issuing administrative acts have been determined, together with the possibility of introducing positive fiction in issuing administrative acts, by a special law, in situations of administrative silence (tacit consent principle; Art. 117). In such a way, for example, the Law on Services will be able to implement full application of the tacit consent principle in services field, according to the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market. According to the legislative policy of Montenegro, the application of tacit consent principle will – under the new APA – be feasible in other fields, too.

Current institute of a *limine* rejection of the party's request due to certain procedural reasons is eliminated (rejection without taking the case into the procedure; *odbacivanje*). According to the new APA, the public law body will not be able to reject the case, but will be obliged to decide and give the reasons for its decision in all cases, although in some of them it will be allowed to make a negative decision (*odbijanje*) due to certain serious procedural reasons (Art. 99).

The new APA reduces the occasions for annulling administrative acts for reasons of formal shortcomings and/or errors, which has so far been the main reason for annulment of administrative acts, in both the administrative procedure and administrative courts, despite precisely established facts and proper application of substantive law. Too many formalities have caused so-called *ping-pong* effect in the relations of first and second instance administrative bodies due to formal and procedural, and not substantive or factual errors. That is why the detailed legal regulation of evidence in the LGAP has been abandoned as a concept, and the provision referring to the rules of civil proceedings evidence has been introduced (Art. 107). Hence, the whole Montenegrin legal system will apply identical rules on evidence simultaneously reducing the level of unnecessary formalism in the investigatory procedure. Additionally, the obligation of the competent public law body to obtain data from official records and registers of other public law bodies *ex officio*, without putting the burden on the party has been stipulated in Art. 13. The new APA introduces and regulates "shortened administrative proceeding", in which decision can be made based on reliable official records and not to the detriment of the rights of parties to the procedure (Art. 106).

The right to appeal as the main legal remedy is regulated in detail. A new legal remedy, the complaint, has been created, aiming to ensure legal protection of the users of services of general interest and citizens regarding all other administrative actions (real acts). Reopening of the administrative procedure has been redefined as a legal remedy that is exclusively in the hands of the party (not as previously, in the hands of the party and public law body). Three legal remedies have been made available to citizens – appeal, complaint, and re-opening of the procedure – thus ensuring full legal protection of citizens in all their relationships with public law bodies.

The appeal has been regulated in line with tradition, but with certain novelties. It is a legal remedy against first instance administrative acts, but it can also be filed if the first instance body has not decided within the deadline prescribed by law. The right to appeal can be denied only by a special law. It has a suspensive effect, meaning that the challenged administrative act in principle cannot be executed during the appellate procedure. The new APA

requires that the first instance body establish all the circumstances about the filed appeal and reasons and facts pertaining to it. The first instance body has full competence to replace its own administrative act challenged by the appeal and to decide, by a new administrative act, about the case if it finds the appeal grounded. If not, it has to send the appeal and the complete case to the second instance body (Art. 125). This is an innovative limitation of the devolutionary effect of the appeal.

Further, the new APA has obliged the second instance authority to discourage swiftly and effectively the opposition of first instance bodies in the case of the party's re-appeal, which has not existed before. The second instance body shall decide by itself in such a case (Art. 126). The absence of such an obligation in practice has entailed time-consuming, exhausting, and ineffective proceedings and has caused huge expenses to the parties and prevented effective undertaking of business ventures.

By both means, i.e. by limiting the appeal's devolutionary effect, and by imposing the obligation of the second instance body to decide by itself in the case of re-appeal, the new APA tries to simplify and accelerate the appellate procedure, to reduce pressure on second instance bodies, and to prevent the yo-yo (or ping-pong) practice in public administration.

The purpose of the complaint is to ensure legality in functioning of the providers of services of general interest and of all public law bodies when performing other administrative actions (see Art. 137). In the first case, a complaint has to be lodged with the supervisory body, which shall decide on it within 15 days by means of an administrative act. The party to the procedure may initiate an administrative dispute against such administrative act in the competent administrative court (Art. 31). In the second case, the party may lodge a complaint with the head of the competent public law body. S/he shall decide on the complaint within 15 days by means of an administrative act. Again, the party may initiate an administrative dispute against the administrative act in the competent administrative court (Art. 35). Provisions about the form, content, and the manner of submitting the appeal are applicable to the complaint *mutatis mutandis* (Art. 138).

Re-opening of an administrative proceeding is limited to the three-year deadline, after which the proceeding cannot be re-opened. Within the three-year deadline, parties have a 30-day deadline to instigate re-opening, counting from the day when they found out about the relevant facts or when they were able to use evidence. If the European Court of Human Rights has decided differently in a similar case, a party has to instigate re-opening of the proceeding within six months from publication of such decision (Art. 132–136).

Ensuring legal protection before an independent and impartial court which may, in an administrative dispute of full jurisdiction (with public hearing), review the legality of each and every action of public administration (not only administrative acts), represents a considerable step forward in the strengthening of the standard of legal protection provided for by the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms. Under the LGAP in force, for many of those actions, such court protection is not stipulated.

2.6. Serbia

The system of legal remedies in Serbia has been significantly changed in the process of preparation of the new 2016 GAPA. In spite of the fact that the new GAPA relies heavily on the former LGAP, it also introduces many novelties, in particular when it comes to the regulation of legal remedies. This is the part of the Law which has undergone the most significant changes in comparison to the 1997 LGAP.

The 1997 LGAP envisaged a plethora of legal remedies, especially in the category of extraordinary legal remedies. Despite that, it did not provide legal protection to the party against every administrative action. The appeal was the only regular legal remedy (*žalba*), while the complaint is not even stipulated in the LGAP but left for regulation by special laws. Reopening of the procedure was regulated in chapter XV entitled “Reopening of the procedure” (*ponavljanje postupka*).

Part III of the 1997 LGAP is titled “Legal remedies” and contains 37 articles (213–260) organised in three chapters which regulate different institutes under a common title. Chapters XIV and XV regulate the appellate procedure (Art. 213–238) and reopening of the procedure (Art. 239–250). Chapter XVI is titled “Special cases of annulment, revocation, and amendment of the act (*rešenja*)” and regulates change and annulment in connection with the administrative dispute (Art. 251–252, deleted in the amendment of the law); annulment and revocation on the basis of supervisory control (Art. 253–254); revocation and amendment of the act with the consent or upon request of the party (Art. 255); exceptional revocation (Art. 256); declaring the act null and void (Art. 257). This part of the 1997 LGAP contains another two articles dealing with legal consequences of the annulment and revocation of the act (Art. 259) and duty of the public body to inform the mother body about the reasons for reopening of the procedure, annulment, revocation, or amendment of the act (Art. 260).

The institutes regulated in the third part of the 1997 LGAP should not be considered legal remedies *sensu stricto*. This is especially the case with the interventions towards administrative act that have not been initiated by the party but by public bodies. According to Article 213/2, several public bodies have the right to lodge a legal remedy despite the fact that they are not parties to the procedure. These are, for example, the public prosecutor or other state bodies, but only a) when authorised by a special law, b) if the law has been violated in favour of a natural or legal person, and c) to the detriment of the public interest.

Real acts of public administration as well as other activities are completely out of scope of the 1997 LGAP. The complaint as a legal remedy against real acts is not stipulated as an admissible remedy that the party could use as an instrument in relations with public bodies.

The 2016 LGAP has introduced new legal remedies not regulated by the 1997 LGAP, simultaneously significantly reducing the number of the so-called extraordinary legal remedies regulated in detail by the 1997 LGAP and the former Yugoslav LGAP.

Article 13 of the new Law (*Right of Appeal and Objection*) sets general principles of legal remedies:

“(1) Unless the law prescribes otherwise, the party shall have the right to appeal against the first instance decision, or if public authority has not decided within the prescribed period in the administrative matter.

(2) The party shall have the right to complain in cases determined by this law.

(3) Competent state authorities may declare appeal and complaint when authorised by law.”

A detailed analysis of Art. 13 of the 2016 LGAP shows there are several principles of the reformed system of legal remedies in Serbia:

- There are two main legal remedies in administrative procedure: the appeal (*žalba*) and the complaint (*prigovor*).
- Legal remedies are reserved for the party and only in exceptional cases for competent state authorities (“when authorised by law”).
- An appeal may be filed a) against every first instance decision, and b) in the case of so-called administrative silence (“if public authority has not decided within the prescribed period”).

- The appellate procedure may be regulated differently by a special law, meaning that the right of appeal may be restricted or completely excluded.
- Complaint is reserved only for the cases explicitly stipulated by the LGAP.

Furthermore, according to the 2016 LGAP, other legal remedies may also exist in administrative procedure.

The 2016 LGAP has made the appeal (*жалба*) the most common legal remedy in administrative procedure. It is also the legal remedy regulated in the largest number of articles. There are 23 articles (151–174) that regulate various issues connected with the appeal in administrative procedure.

An appeal can be lodged against every first instance decision and in case of silence of administration (when administrative authority does not issue a decision on administrative matter within prescribed deadline). Further, an appeal against first instance decisions may be filed by any person whose rights, obligations, or legal interests might be influenced by the outcome of the procedures, within the same time limit as the party in administrative procedures (Art. 152/6).

In general, the appeal has a suspensive effect on decision enforcement. However, in some situations decision can be enforced despite the appeal: a) if enforcement is prescribed by law; b) if decision is made in oral form; c) if suspension of execution would cause irreparable damage to the party, or d) seriously threaten public interest.

Another legal remedy is the complaint (*приговор*), which is regulated by only four articles (Art. 147–150). The complaint is a subsidiary legal remedy reserved for situations when there is no other form of legal protection in the administrative procedure. It can be filed against an administrative contract (Art. 25), an administrative action (Art. 28), and against provision of public services (services of general interest) (Art. 32).²⁸ Unlike filing an appeal, a complaint is lodged with the head of public authority whose conduct is the subject of complaint. S/he establishes the facts and examines the regularity of actions of the said authority. The head of the authority decides on the complaint. The complaint is resolved by an administrative act (*rešenje*) against which an appeal can be filed. This is the basis for introducing the complaint into the system of legal remedies, which may result in legal protection in administrative court.

²⁸ The October 2015 Draft used the term public services (*javne usluge*), not services of general interest, which has become dominant *terminus technicus* in the EU acquis.

Finally, the new Serbian LGAP of 2016 regulates the *restoration of prior status* (*враћање у пређашње стање*) as a particular type of legal institute intended for situations when parties to the procedure fail to act within specified deadline and due to that omission lose their procedural rights. Such a situation is regulated by Art. 82 and 83 of the new LGAP. Restoration of prior status is limited by objective (3 months from the omission except in case of *vis maior*) and subjective (8 days from the reasons for omission) deadline. Request for restoration of prior status is submitted to the administrative body before which the omitted action should have been taken.

2.7. Comparative Overview: Austria, Slovenia, Croatia

2.7.1. Austria

Austria has based the development of its system of legal protection in general administrative procedure on the appeal as a prerequisite for further use of judicial review (Adamovich and Funk, 1987; Dragos and Neamtu, 2014: 209–220). It has thus served as an example to most Eastern European countries. First, in the majority of cases (except when a minister or a regional government was already competent in first instance), it was traditionally mandatory to appeal to at least one, and sometimes even three, administrative authorities. Only afterwards, the party could request judicial review. These rules and relations have changed in the course of a recent administrative justice reform (2012–2014, Dragos and Neamtu, 2014: 221, etc.).

The Constitution regulates the key provision on effective legal protection in Art. 132, stipulating that there is a right to appeal or complaint against a decision issued by an administrative authority before the administrative court. Additionally, paragraph 6 stipulates that insofar as the procedure takes place in the municipality or “municipal autonomy” (Art. 118), an application with the administrative court may only be lodged after (administrative) remedies have been exhausted. In addition, in the sphere of municipal autonomy, Art. 118/4 explicitly stipulates two administrative instances (enabling the federation or the region, depending on their competence to deal with the specific issue, Art. 115/2, to cancel this exception).

The Constitution allows the parties to go to administrative court immediately after notification of the first instance decision in all cases except those pertaining to the affairs of municipal autonomy. Sector-specific laws, on the

other hand, offer the party concerned the option of an additional administrative remedy. Art. 63 of the AVG extends its scope beyond the sphere of municipal autonomy to all individual administrative acts.

Second instance review against first instance decisions in municipal matters has been performed mostly by *Länder* independent administrative chambers (senates) since their establishment in 1991. There are nine *Länder* in Austria, eight territorial or regional and one of the capital Vienna. In 2002, the capacities of these independent administrative chambers were significantly extended. Second instance review may be followed by Administrative Court Review and specific tribunals, and finally, by the Constitutional Court. Tribunal may decide on the merits (not only cassation), mainly in order to prevent the ping-pong effect, but courts are usually limited to cassation.

The total number of complaints lodged with the Administrative and (after 2008) the Asylum Court every year against administrative authorities varied between 6,000 and 8,000 during the last decade. Proceedings were rather long, lasting between 19 and 23 months. Out of approximately 6,000 cases, about 25 % of contested administrative decisions were annulled in 2011.

To sum up, from 1 January 2014, the overall structure of protection in administrative matters in Austria incorporates:

- administrative authorities of first instance (with superior control bodies);
- administrative appeal is guaranteed and at the same time mandatory (*Berufung*) prior to judicial review only in municipal self-government unless provided explicitly by specific laws (see the AVG, Art. 63);
- the party will be entitled to directly lodge a “complaint” (*Beschwerde*) in other proceedings (beside municipal) with administrative courts that will mostly decide on merits including *reformatio in peius*;
- judgments of the administrative courts of first instance can be challenged in the supreme Administrative Court;
- a complaint can be lodged with the Constitutional Court (if claiming infringement of a constitutional right) with cassation mandate and further in front of the ECtHR.

In addition, the AVG stipulates a legal remedy of reopening of the proceedings. Moreover, it classifies reinstatement into previous position (*restitutio in integrum*) as a remedy explicitly called quasi-legal remedy. It is not elaborated here due to hybrid theoretical notion of this institution.

As stipulated in Art. 57, an appeal may be lodged against an issued administrative decision with the issuing authority within two weeks after the

party, her/his representative, or other subjects as interested parties received a written copy of first instance administrative decision. Within two weeks after receipt of the appeal, the authority shall instigate an enquiry.

In principle, an appeal against procedural orders, against the approval of or the order for reopening of the proceedings, and against the approval of reinstatement into the previous legal position is excluded by Art. 63 (two specific legal remedies stipulated in Art. 69–72). A party can also waive the right of appeal (after receiving the act). The party must file the appeal within two weeks.

The appeal has a suspensive effect (if permissible and filed in due time). However, the authority may exclude the suspensive effect by an administrative decision if, after having considered the affected public interests and the interests of other parties, the early enforcement of the contested administrative decision or the exercise of the authorisation granted by the contested administrative decision is urgently required because of imminent danger (Art. 64). In order to accelerate the decision-making, the Austrian GAPA has been amended by Art. 64a, which stipulates that the authority may process the appeal by a preliminary decision within two months after the receipt on the part of the first instance authority. After having carried out any further additional investigation, it may reject the appeal as inadmissible or filed too late, cancel the administrative decision, or modify it in any way. Within two weeks after receiving the preliminary decision on the appeal, each party may file a request that the appeal be submitted to the appellate authority for decision (request for filing). Upon receipt of the request for submission, the preliminary decision on the appeal becomes ineffective, which must be conveyed to the parties.

If the appeal contains new facts or evidence the authority deems material, it must immediately notify persons who may wish to contest the appeal and give them the opportunity to obtain information on the subject matter of the appeal and to comment on it within an adequate term not exceeding two weeks. An additional investigation which may be necessary has to be carried out by an authority of lower instance upon instruction by the appellate authority. In principle, the appellate authority always decides upon the matter directly, unless the appeal is rejected as inadmissible or late.

The Austrian Law deals with timing as a crucial element of good government, defining a deadline of six months to issue administrative decisions at first instance and two months in appellate instance; sector specific laws can define different deadlines (Art. 73, 64a). Administrative silence was regulated in the original codification of 1925. Today, new ways to solve the issue of

administrative inaction are being developed on a regular basis. Traditionally, in case of delay, competence may be transferred to the superior authority at party's request. Devolution of competence is possible only on the party's request and if the legal remedy is not submitted to court immediately (outside municipal area). If the delay was not caused mainly by the fault of authority, the request is denied. If there is inactivity of an administrative authority, the Administrative Court may accept to adjudicate the case. Otherwise, the petitioner has the right to demand an administrative decision.

Reopening of the proceedings is another legal remedy that may be field by a party. The deadline is rather short: two weeks for subjective deadline (from the date when the party submitting the request obtained knowledge of the reason for reopening), and three years for objective deadline (after issuing the first instance decision). The party's motion is admissible only if no (regular) remedy is available, after finality of an act. Grounds to initiate reopening of the proceedings are strongly limited to new facts and evidence, preliminary issues, and a decision issued on the base of forged evidence.

Reopening of the proceedings may also be ordered *ex officio*, even the three years have expired if an administrative decision has been fraudulently obtained by a forged deed or certificate or by any other act punishable under criminal law.

Reopening is a non-devolutive remedy. The administrative decision authorizing or ordering the reopening must state to what extent and at what stage of instances the proceedings shall be resumed, unless a new administrative decision can be issued based on the documents already in the possession of the competent authority.

With regard to the ECtHR (in particular in relation to Art. 6 and 13 of the ECHR as ratified in 1957), there are some important cases, for instance Neumeister (1968), (322 judgments 1959–2012) where infringement was found in 232 of these cases. Regarding contrary norms between the Austrian constitutional and legal order and the ECHR, today the rule of *lex posteriori derogat legi priori* is in place. Hence, the ECtHR is regarded as *de facto* constitution, legally at the level of federal and directly executable law. However, the number of cases is decreasing, especially in comparison to other countries. Some of the most important judgments include 1936/63 Neumeister v. Austria, 27. 6. 1968, 2614/65 Ringeisen v. Austria, 16. 7. 1971, 12235/86 Zumtobel v. Austria, 21. 9. 1993, 74159/01 Egger v. Austria, 9. 10. 2003, 45322/08 Seidl et al. v. Austria, 19. 12. 2013.

2.7.2. Slovenia

The Slovene GAPA stipulates one regular or ordinary legal remedy for all administrative procedures – the appeal, filed only by the party to the procedure or the state attorney (not *ex officio* by an administrative agency). There are five extraordinary legal remedies, all of which may be used by the party or *ex officio* and some by the public interest representatives. The number of legal remedies in the 1999 GAPA was reduced because of the inefficiency of the system. Nevertheless, compared to other procedural laws, legal remedies in the GAPA are rather distinctive. There are additional, but rarely defined legal remedies regulated by sector-specific laws, such as revision in retirement matters or objection or annulment of the final decision in tax matters.

Regarding the administrative proceedings and the relation toward judicial protection, Slovenia applies a mandatory system of administrative appeals i.e. allows the appeal within administrative proceedings as a procedural precondition for judicial protection (similar to Germany, Austria, etc.). Based on the Constitution, the GAPA, the ADA, and the Constitutional Court Act, the ordinary legal path in asserting administrative rights and obligations in the Slovenian system is as follows (Kovač, 2013: 39–42):

- First instance administrative proceedings (before various competent authorities regardless of their public or private status if they perform individual administrative decision-making) are initiated upon request from one of the parties or *ex officio* in order to protect the public interest.
- Second instance administrative proceedings (the appellate instance, almost always the line ministry that is obliged – pursuant to the Constitution – to regulate the state of affairs in a certain field) are initiated if, within 15 days from the serving of the first instance decision, a party or – in order to protect public interest – the state attorney file an appeal against the decision issued upon the completion of the first instance proceedings, whereby the second instance decision makes the administrative matter final and enforceable (the appeal stays the execution of the contested decision). There are approximately 3 per cent of appeals submitted annually (following from approx. 10 million first instance decisions).
- Once the decision has become final, an administrative dispute may be initiated within 30 days from the serving of the second instance decision if a party or – in order to protect the public interest – a government representative lodge an appeal against the administrative decision with a specialised administrative court of first instance. In certain cases, even an appeal against the ruling issued at first

instance of an administrative dispute is admissible; here, the case is decided by the Supreme Court of the Republic of Slovenia. Upon completion of the administrative dispute, the matter becomes final. Both courts decide within full jurisdiction only exceptionally (in case of infringement of constitutional rights).

- Should the administrative authority or the court in deciding on constitutional rights or obligations of the party violate such rights, the party may lodge a constitutional appeal with the Constitutional Court of the Republic of Slovenia, or further invoke the protection of the European Court of Human Rights if the Slovenian authorities are deemed to have violated the ECHR.

The rule applying to any procedure or stage of procedure is that the exhaustion of the previous stage is a precondition for the enforcement of the following option of legal protection.

The appeal is the only legal remedy applied prior to finality (Art. 229–259 of the GAPA; Androjna and Kerševan, 2006: 462–535). The appellate procedure thus refers to the same matter that was subject to the procedure at first instance. Therefore, in addition to the party, the appeal may be filed by its representative (the authorisation for representation at first instance is also valid at second instance). Apart from the parties, the right of appeal is granted to persons with legal interest (accessory participants, Articles 43 and 142), who can assert their legal interest even after the decision has been issued at first instance if they previously have not had such possibility. Active legitimacy to file an appeal is also held by the representatives of public interest (Art. 45), primarily the state attorney, and theoretically also the state prosecutor (in practice, the state prosecutor is never involved). Since 2008 (adoption of amendments to the GAPA, version ZUP-E), the legitimate persons have had the right to renounce the appeal. Such a possibility is admissible at the request of the party in order to achieve the execution of the decision sooner, e.g. on the day of the serving or in simple matters even before the issuing of the decision (see Art. 229a, 224 and related articles of the GAPA).

In exceptional circumstances only, according to constitutional right to an effective remedy, the appeal is excluded based on the GAPA or a sector-specific law – in such a case, the decision may be challenged by extraordinary legal remedies and within the administrative dispute (Art. 13 of the GAPA based on Art. 25 and 157 of the Constitution). The appeal has a devolutive effect. As a rule, it also has a suspensive effect. The appeal is a dispositive legal remedy since the appellate procedure may be launched only by a party to the procedure, whilst the appellate body examines the decision within the limits of the assertions stated in the appeal. The appellate body examines

ex officio – irrespective of the reason invoked by the appellant – only the violations of substantive law and seven absolute significant procedural errors (Art. 247).²⁹ Here, the principle of prohibition of *reformatio in peius* applies with some exceptions (Art. 253). Thus, the second instance body may, in order to protect the public interest or the rights of third parties, interfere with the legal status of the appellant to the detriment of the first instance decision, if particularly severe errors, which have been defined by the GAPA as reasons for the application of three extraordinary legal remedies, have been established in the first instance procedure or in the issued decision, (Art. 274, 278 and 279). For such errors, the GAPA stipulates the following remedies: annulment *ab initio* or annulment through the supervisory right (e.g. for having violated the subject matter jurisdiction or interfered with *res judicata* with a new, different decision than the one that has already become final); extraordinary annulment (if the execution of the decision would threaten people's life and health); and nullity (e.g. if the administrative body issued a decision concerning a matter in court jurisdiction, or without the request by the party and the party has not subsequently consent to the procedure).

The appeal implies the most broadly defined reasons for challenging a decision (Art. 237). A decision can be challenged separately or for several reasons together, i.e. for incorrect and incomplete establishment of the state of facts, for violation of substantive law (e.g. if the decision is not based on substantive regulation or the latter has been misapplied or misinterpreted, or in the case of a discretionary decision), or for violation of procedural rules. These reasons are closely related. For example, in the event of incorrect or incomplete establishment of the state of facts, the body will most probably misapply substantive law. As for procedural errors considered to be severe violations infringing upon formal legality, the GAPA lists seven errors, thereby defining the most important rules that form the basis of administrative relations (Art. 237/2):

- the administrative body (subject matter jurisdiction, impartiality of officials),
- the party (legitimacy, proper representation, the right to declare themselves, communication in official language), and
- the administrative act as a form of decision (the decision must have a form that allows verification, it must be made in writing and contain the prescribed elements).

29 The absolute procedural errors according to Art. 237 of the GAPA include: violation of subject matter jurisdiction, prevention of participation and of the possibility of the parties or accessory participants to declare themselves, violation of the rules on representation of the parties (in particular of parties without contractual capacity), violation of the rules on the use of language, impartiality of officials, and situations where the decision cannot be verified (e.g. due to contradictory elements or insufficient reasoning).

The party must state why the appeal is being filed, or it will be regarded as incomplete or incomprehensible (Art. 67). However, not every procedural error guarantees success to the appellant – the appeal will be rejected if the error is not significant, i.e. if the decision would still be the same without that error. This applies even in the event of incorrect reasoning, if the operative part is correct – the appellate body then adopts a decision whereby it rejects the appeal and corrects the reasoning. An appeal may also be filed if the administrative body fails to act, i.e. if the decision concerning the party's request has not been issued within the prescribed deadline (Art. 222/4). Failure to act means that the competent administrative body has not issued an administrative decision within two months or one month in simpler procedures. If the competent body fails to issue the decision and serve it to the party by the set deadline, the party has the right of appeal as if their request has been rejected. Therefore, the law has defined failure to act as a fictitious negative decision, granting the right of appeal.

Data on the use of appeal as an ordinary legal remedy indicate that out of approximately 10 million first instance decisions issued every year, an appeal is filed in only 1.3 per cent of the cases on average (mainly in relation to taxes – approx. 3 per cent of the cases; Dragos and Neamtu, 2014: 376–382). Quite impressive are the data listed below in relation to the result of appellate procedures (valid for all fields):

- 20% of the appeals lodged are dismissed owing to formal shortcomings or the procedure is suspended because the party has withdrawn the appeal, etc.,
- 20% of the appeals are granted; in half of the cases a different decision is adopted by the second instance body (Art. 252), the other half of the cases is returned to the first instance with the instruction on how to conduct the renewed proceedings (Art. 251),
- approximately 60% of the appeals are rejected.

Considering the obligation whereby the exhaustion of the appeal is a prerequisite for judicial protection, it may be concluded that the possibility or obligation of the appeal obviously discourages at least 40% of the parties who are not satisfied with the decision of the first instance administrative body from taking court action. To a certain extent, this prevents further increase of the courts' caseload. Regarding the caseload, the data indicate that the number of suits filed in administrative dispute has been decreasing steadily both in administrative and other matters (e.g. electoral acts, civil servants' salaries), namely app. 3,300 in the past years, about 10 per cent of which have been dismissed and the others admitted for substantive assessment.

Hence, there are (only) about 2–3,000 cases out of a total of 180,000 that did not succeed in the appellate procedure.

Viewing the situation in Slovenia in terms of six principles governing an effective complaint system by Harlow and Rawlings (1997), the entire administration can be assessed in qualitative terms as follows: (1) easily accessible and well-publicised: high; (2) simple to understand and use: high; (3) speedy, with established time limits for action, and keeping people informed of progress: problematic in certain parts and in the system as a whole, but progressing; (4) fair with full and impartial investigation: moderate to high; (5) effective, addressing all the points at issue, and providing appropriate redress: moderate to high; (6) informative, providing information to management so that service can be improved: moderate.

Besides the appeal, the Slovene GAPA stipulates renewal or reopening of the proceeding – as an extraordinary legal remedy (Androjna and Kerševan, 2006: 543), but rather commonly used, app. 10,000 cases (out of 10 million) annually. Renewal is possible only in relation to a decision on the merit. A proceeding that has been completed may be renewed if the following two conditions are met: if the decision issued has already become final; and if at least one of the ten reasons for renewal pursuant to Art. 260 of the GAPA (or other reason provided by a specific law) has been fulfilled.

Renewal of the proceeding may be initiated *ex officio* or at the request of a party or an allegedly disregarded accessory participant (section 9, Art. 260 in relation to Art. 229 of the GAPA). Renewal may also be proposed by the state prosecutor or the state attorney, if the decision interferes with the public interest. Renewal is an absolutely non-devolutive legal remedy since the reason for renewal generally refers to the actual state of facts and to the procedural violations in issuing the contested act. The practice of certain sector-specific regulations and the problems in many administrative fields suggest that it would be wise to introduce a “quasi-renewal” of the proceedings in order to take account of the facts incurred after issuing the decision, when such facts affect (the extent of) a current right or obligation (at present, renewal according to item 1 of Art. 260 is possible only for “old new” facts, i.e. facts existing at the time of issuing the decision). When formal requirements are not met, the competent body dismisses the request with an order. If the reason is at least possibly indicated, the body examines whether such reason could affect the decision and a different decision could have been issued (except for the reasons contained in sections 9 and 10 of Art. 260). If there is no effect, the competent body issues a decision whereby it dismisses the request to renew the proceedings. If, on the other hand, the reason for renewal could affect the decision, the body issues an order

whereby it allows the renewal of the proceedings, stating which facts and to which extent the proceeding shall be renewed or repeated.

In renewed proceedings, either individual procedural actions are repeated (e.g. examination of a witness supposed to have lied at the previous hearing) or the entire proceedings are renewed. The request for renewal does not stay the execution of the decision for which renewal is requested. The appeal is allowed against the order issued regarding the request for renewal of the proceedings, against the order regarding renewal *ex officio*, as well as against the decision issued in renewed proceedings. Upon completion of the renewed proceedings, the competent body confirms the previous decision, annuls it, or annuls it ab initio.

2.7.3. Croatia

The new Croatian LGAP has significantly changed the previous system of legal remedies, especially by introducing a completely new institute of complaint (*prigovor*) and by reducing the number of extraordinary legal remedies inherited from the Yugoslav tradition. The right to legal remedy is one of the basic legal principles. The new Law stipulates the appeal (*žalba*) and the complaint (*prigovor*) as the main legal remedies in administrative procedure (Art. 12).

In comparison to the previous LGAP, several interesting novelties have been introduced regarding the appeal. Firstly, parties may waive their right of appeal and withdraw from a filed appeal (Art. 106). Moreover, the second instance body is obliged to revoke the decision and decide upon the matter by itself in the cases prescribed by law (if the facts established in the first instance proceedings are incomplete or incorrect, if the proceedings have not taken into account the rules of procedure which would have had an effect on resolving the matter, if the disposition of the disputed decision is unclear or in conflict with the explanation, if there was a misapplication of the rule pursuant to which the matter was decided) (Art. 117/1). However, the matter shall be delivered for decision to the competent body of first instance when (1) with regard to the nature of the administrative matter concerned, direct deciding by the first instance body is necessary in order to render a new decision, and the body of second instance finds that the decision should be revoked (Art. 117/2), and (2) when the first instance decision has been made by an incompetent body (Art. 117/3).

Since the regulation is not sufficiently precise and having in mind previous administrative practice, there is a risk that second instance bodies will return

the cases to first instance bodies by referring to Art. 117/2 even when it is not justified (Koprić, 2010).

The party has a right to appeal (or to initiate administrative dispute) if an official person fails to decide within the prescribed deadline and to deliver it to the party (silence of administration). However, the new LGAP has stipulated the so-called positive fiction, i.e. the consideration that the party's request has been adopted under the following conditions: 1) it has to be prescribed by a special law, 2) the request has to be submitted in an orderly manner, and 3) the body has to be authorized to solve the administrative matter (Art. 102).

The new LGAP stipulates four types of complaint (*prigovor*):

1. Complaint against a notice to the applicant of petition or notification

The applicant has the right to lodge a complaint with the public law authority from which they have received a notice refusing their application to instigate proceedings within eight days following the receipt of the notice and in the event they received no reply within the prescribed deadline (Art. 42). The complaint is to be lodged with the head of the body that shall decide upon it in eight days following the day when the complaint was filed.

2. Complaint due to non-fulfilment of an administrative contract by the public law authority

A party may file a complaint in order to ensure the fulfilment of an administrative contract by the public law authority. The complaint may request the award of damages incurred from the failure to fulfil contractual obligations. It must be filed with the body responsible for supervision of the public law authority with which the party made the administrative contract. The complaint is deliberated on by a decision against which an administrative dispute may be instituted (Art. 154).

3. Complaint for protection from the actions of public law authorities on which the decision is not made

Any person who considers that another action of the public law authority in the field of administrative law, on which a decision is not made, violates his/her rights, obligations, or legal interests, may file a complaint as long as this action or its consequences last (Art. 156).

Furthermore, when the public law authority refuses to notify an interested party at their request of the conditions, manner, and procedure for exercising

or protecting their rights or legal interest in a specific administrative matter or when it fails to issue the notice within 15 days after receiving the request, the party has the right to file a complaint within eight days (Art. 155). The complaint is to be filed with the head of the body that decides upon it in eight days following the day when the complaint was filed.

4. Complaint for protection from the actions of public service providers

The actions of public service providers entail the actions or omissions of public service providers which affect the rights, obligations, or legal interests of natural and legal persons and which are not resolved in administrative proceedings. When a beneficiary of public services considers that their rights or legal interests have been violated by the actions of a provider of public services, they may file a complaint for the protection of their rights or legal interests with the body responsible for conducting supervision of those activities (e.g. to the ministry of education if the public service provider is an educational institution). The complaint may be filed as long as the action or omission of public service provider lasts. The public law authority has to inform the beneficiary of the public service about the actions taken upon the complaint without delay, and in any case no longer than within 30 days from filing the complaint. If the beneficiary of services is not satisfied with the actions taken or if the beneficiary has not been informed on the actions taken within the set deadline they may initiate an administrative dispute (Art. 157 and 158).

An appeal may be filed against a decision on the complaint made by the body of first instance whilst an administrative dispute may be instituted against a decision on the complaint made by the body of second instance. If there is no body of second instance, an administrative dispute may be instituted against the decision on the complaint (Art. 122/4).

Reopening of the procedure is mostly adapted from the previous LGAP. It may be instituted at the request of the party or *ex officio*, within subjective deadline of 30 days following the date when the party obtained knowledge of the reason for reopening or the date when they were able to use new evidence (Art. 123/3). The state attorney or other authorized state body may request reopening of the proceedings under the same conditions (Art. 123/4). In seven cases reopening of the procedure may be instituted within three years following the delivery of the decision to the party (Art. 123/1), and in three cases it may be instituted without any time restrictions (Art. 123/2).

2.8. Conclusions and Recommendations

Although several countries have the right to appeal or the right to a legal instrument against administrative acts proclaimed as the constitutional right, there are many problems regarding effective protection of citizens' rights in their relations with public administration bodies. Legal protection has to be widened, upgraded, and improved in order to have the legal and administrative systems harmonized with the contemporary European standards. Besides legal deficiencies, there is no efficient system of monitoring the implementation of administrative procedural law. Because of that, an in-depth empirical analysis of the current system of protecting citizens' rights in administrative procedures is not possible.

Random data that can be occasionally found lead us to conclude that there are several very important problems connected with usage of legal remedies in contemporary administrative procedural systems in Western Balkan countries. There is a rather serious problem of non-compliance with deadlines in administrative proceedings. This problem refers equally to first instance bodies and second instance, appellate bodies. Administrative silence has multiple harmful effects, but the most prominent one is low level of trust into public administration. Non-transparency, space for corruption, and similar additional issues come close second.

Previous administrative procedural laws imitated court proceedings in which – according to the tradition – second instance court rarely makes decisions. Because of that, there is a problem with the so-called ping-pong effect in administrative proceedings: constant annulments of first instance administrative acts, repeated issuing of similar first instance acts after the annulments, and continuous re-appealing against them. There are two complementary problems: resistance of the first instance bodies to the second instance annulments, and bureaucratic annulments by the second instance bodies instead of their thorough decision-making on the appeals and the cases. For that, the public tends to share impressions about inefficient public administration, which is partly confirmed by data on administrative silence and backlogs. The main purpose of administrative procedures is not an exhausting search for formal truth, but as quick resolution of life situations of citizens, businesses, civic organizations, and other societal subjects as possible. Fast, simple, and efficient administrative procedures are the real need of modern public administrations.

The narrow definition of administrative matter and administrative act caused a problem with too limited administrative court control over public administration

even in the cases where such a control system existed. Thus, not all interactions of public administrations and citizens were covered by some form of legality control. While focusing formally on court-like legal regulation of general administrative procedures, there were many situations in which citizens were left without any control of public administration functioning. The situation became even worse after several very important services of general interest were pulled-out of public sector through liberalization and privatization policy. Citizens as users and consumers have been left without any possibility of protecting their rights and fostering universal service duties of private providers of such services.

The main recommendations with regard to regulation of legal remedies are:

1. The countries in the Region need to establish efficient monitoring of their systems for the protection of citizens' rights in administrative procedures, in order to have accurate and timely data about the effects of their regulation of legal remedies in administrative procedures. Thus, they will be able to assess the regulation of legal remedies more objectively and propose appropriate normative changes.
2. It is advisable for Western Balkan countries to introduce well-designed case management systems based on modern IT in order to exert constant pressure on all public bodies to resolve administrative cases and provide all necessary public services within legally prescribed deadlines. In that way, they will do much to reduce the problem of administrative silence.
3. Furthermore, it is necessary to review all administrative fields and identify in which sectors the so-called positive fiction of administrative act may be easily introduced. Although there are some problems with fictitious administrative act, in certain areas its introduction into the legal system by means of special laws may be an appropriate measure for fighting administrative silence.
4. It is important not to think of the appeal as an excuse and an opportunity for blame shifting within public administration. Therefore, it is recommendable to invent such legal solutions that will enable and entice first instance bodies to solve the appellate cases by themselves, without sending their case files to the second instance. The solutions have to be such that will motivate first instance bodies to reconsider, additionally check, and invest more effort in appellate cases, because they are in better position to do all these assessments *in situ*. Further, it would be advisable to invent instruments for decreasing possible resistance of first instance bodies to the second instance legal opinions. Finally, it is necessary to eliminate the possibilities of bureaucratic annulments of administrative acts – second instance bodies have to have not only a duty but also effective instruments for solving administrative cases and preventing the ping-pong effect.

5. It is necessary to cover all the situations in which citizens stand *vis-à-vis* public administration by procedural guarantees of general administrative procedural laws. This requires a broad definition of administrative matters, as well as the invention of legal remedies concerning the so-called real acts, provision of public services, and other situations. Introducing complaint as a legal remedy for such situations seems to be a well-chosen option.
6. Reopening of the procedure may serve as a legal remedy against valid administrative acts, but in that case, it seems appropriate to design it as proper legal remedy, a legal instrument which is completely in the hands of a party to the procedure. All of the cases when public law bodies have to intervene into a valid administrative act have to be (and may be) defined separately, in the chapters on *ex officio* interventions.

3. EX OFFICIO INTERVENTIONS

Analysis of ex officio (extraordinary) interventions by public bodies, such as annulment, revocation, etc.

3.1. Albania

Albania has a rather strong system of legal remedies submitted and used on public administration's own accord, beside subjective legal (and judicial) protection of private parties. Such a system reflects, especially in the still valid 1999 Law, a legacy of internal elaboration of complaints. It strives for more effective realisation of the public interest and implementation of state policies as set in substantive legislation (Çani, 2012).

Consequently, there are provisions in the 1999 CAP that allow the authorities themselves to initiate the proceedings of revocation or abrogation and modification, especially for invalid acts or those that are deemed invalid (Art. 115–120). That is evident from the structure of the CAP, which first defines invalidity, then deals with abrogation or revocation of administrative acts in Section IV, Articles 121–126, and finally regulates (informal and formal) appeal in Art. 135 *et seq.*

However, sector-specific laws can provide various special legal regulations to review administrative activities in addition or superior to the CAP. These regulations (such as those pertaining to Customs Service or social and health insurance) are limited by the deadlines stipulated for filing the appeal. Moreover, administrative acts in these sectors cannot be reviewed if they have created rights for beneficiaries not compliant to the review.

In some cases, such as issuing an act outside administrative competence, the act has no legal effects *ex lege*, without necessity of conducting special proceedings (unless required by a party). Absolutely invalid acts cannot be abrogated or revoked *ex officio* (Art. 121). The situation is similar when special laws stipulate irrevocability/non-abrogation of administrative acts or when these laws provide for legitimate rights, or grant the administrative offices certain rights and obligations which they cannot waive (Art. 122). In principle, however, there are systems of dual options in all cases (except absolute invalidity and special exceptions):

- upon request of any interested party, or
- *ex officio* remedies (upon the initiative of the competent body).

Further, the CAP 1999 defines the invalid administrative acts to be revoked or abrogated only because of their invalidity and within the time limit defined for the submission of judicial review (Art. 123).

Revocation is non-devolutive in principle, but it can be devolutive in the case of delegated tasks. Abrogation is a non-devolutive remedy. Pursuant to Art. 124 of the CAP 1999, the competence for revoking an act belongs to the issuing body (or delegated body and delegating body). The competence of abrogating lies with the superior body.

The revoking or abrogating act must have the same legal form and is subject to the same procedures as the revoked or abrogated act unless otherwise provided by law. Their effect is usually only *ex nunc*. The *ex tunc* effect is allowed, but only exceptionally, if the body that issues the revocation or abrogation gives retroactive effect to its act. This is allowed pursuant to Art. 126 only when all the interested parties agree in writing about the revocation/abrogation of the act, on condition that the act has created such rights that can be waived.

In addition, the CAP of 1999 defines (Art. 129) the essential corrections with *ex tunc* effect concerning the expression of will of the administrative body that can be corrected at any time by the bodies entitled to revoke or abrogate the act.

According to the new CAP of 2015, annulment and revocation are regulated as *ex officio* remedies, but not in the section of the Law devoted to legal remedies but before that, in the section on administrative activities (as in 1999).

An administrative act may be annulled or revoked *ex officio*, by the public body that has the competence to issue the act, by its superior body or by another body explicitly determined by law. Annulment has a retroactive (*ex tunc*) effect while abrogation produces effects for the future only.

A novelty of the 2015 law follows the ReNEUAL Model Rules (Hofmann, Schneider and Ziller, 2014), distinguishing remedies according to their effects for the parties. Namely, if the beneficiary party is in good faith (not being aware of or negligent), the unlawful beneficial administrative act may not be annulled but only abrogated.

Annulment and abrogation related to the protection of the public interest, which are listed in Art. 117/1, may be executed at any time (Art. 119), but

abrogation in other cases is allowed within 30 days from the date the public body gains knowledge of facts which justify the annulment or abrogation, and not later than five years after the notification of the administrative act.

A lawful administrative act may be annulled if the party has not met the obligation established by the administrative act or has not done so within the established deadline (Art. 116). A lawful administrative act may be abrogated only if it is necessary in order to prevent serious danger to the life and health of people or to public safety, and if this cannot be done by other means, which would interfere less with the rights or legitimate interests of the party, in which case the party shall be entitled to compensation (Art. 117).

To sum up, we can observe radical progress of limiting *ex officio* measures when comparing the 1999 and the 2015 CAPs. These limits refer to the type of remedies, scope of their usage, deadlines, reasons applied, and effects. The change is aimed at making legal protection a guarantee of the parties' subjective rights. However, amendments seem partially inconsistent. Consequently, there is room for improvement, at both regulatory and implementation levels.

3.2. Bosnia and Herzegovina

In order to ensure the principle of legal certainty, complete and final decisions may be challenged within the administrative procedure only exceptionally. The (G)APAs in Bosnia and Herzegovina still contain "extraordinary legal remedies" from the Yugoslav GAPA and lag behind other countries in the Region, which have modernised their systems of legal remedies at least to some extent. The greatest shift in this field is the abandonment of the obsolete institute of request for the protection of legality, but only by BiH (state level) and the BD.

The "extraordinary remedies" can be categorized according to the following three criteria:

- the subject authorized to challenge the decision (body that issued the decision or supervisory body *ex officio*; a party to the procedure; the state prosecutor; the state attorney; the BiH Ombudsman in the case when citizens' rights and freedoms guaranteed by the BiH Constitution, the Convention, and instruments stipulated in Annex 6 of the General Framework Agreement, are affected by decision),
- the type of decision challenged by the extraordinary legal remedy (complete, final, enforceable, null),

- the consequences of acting based upon extraordinary legal remedies/ *ex officio* instruments (revocation, annulment, modification, declaring decision null).

Out of five “extraordinary legal remedies” provided (or six, if the request for protecting legality is included), only one is based exclusively on the authority’s *ex officio* acting: modification and annulment of decision related to administrative dispute. Other “special cases of annulment, revocation, and modification of decisions”, as stated in Part three of all (G)APAs, may be activated either *ex officio* or upon the request of the party or other authorized subject.

There are two types of legal remedies related to complete decisions (modification and annulment of a decision related to administrative dispute, and annulment and revocation of a decision upon official control). Two of them challenge final decisions (request for protection of legality, and revocation and modification of the final decision upon consent or request of the party). One relates to enforceable (and mostly complete) decisions. Declaring a decision null refers to the decision which does not produce any legal effects.

The potential consequences of each extraordinary legal remedy are indicated in the titles thereof. However, their differences have to be stressed. The annulment of a decision has *ex tunc* effect, which means that legal consequences resulting from such a decision are also annulled. As stipulated in the (G)APAs, declaring a decision null has the same consequences, although such decisions do not produce any effects *ex lege*. Legal consequences produced by a revoked decision remain even upon revocation of the decision, but the latter will not produce any further legal consequences. It means that revocation of a decision has *ex nunc* effect.

Modification and annulment of a decision related to administrative dispute is conducted only *ex officio* by the authority against whose decision an administrative dispute has been initiated prior to the resolution of the dispute when the authority in question has granted all the claims stated in the appeal on the same grounds on which the court in administrative dispute may annul the decision, provided that the rights of the party to the administrative procedure or of third parties are not prejudiced.

Annulment and revocation of a decision upon official control may be initiated *ex officio*, at the request of the party, the state attorney, or the BiH Ombudsman. The (G)APAs prescribe four reasons for annulment of a decision, related to subject matter jurisdiction; *res iudicata*; lack of required consent, confirmation, approval, and opinion of an authority; and forgery. A complete decision may be revoked upon official control if it represents a plain violation of substantive law, and in the administrative matters involving two or more parties with opposing interests, but only with their consent. The

decision on annulment may be adopted within five years, except in the case of forgery, when it may be adopted regardless of any specific deadlines. The decision on revocation may be adopted within one year from the date when the decision became complete.

A final decision may be revoked or modified upon consent of the party and without prejudice to any third party if the party has been granted certain right under that decision, and the authority that has adopted it is of the opinion that the decision represents violation of the substantive law. The decision imposing an obligation upon the party may be revoked or modified with prejudice to the party only upon the party's consent. Under the same conditions, the final decision that is disadvantageous to the party may be revoked or modified upon request of the party.

An enforceable decision may be partly or completely revoked if it is necessary to protect the public interest, namely to eliminate a serious and immediate threat to human life and health, public safety, peace, order or public morale, or to eliminate economic disturbances.

There are some serious violations that make a decision null, i.e. without any legal effects (if a decision concerning a matter from within the court jurisdiction or concerning a matter which cannot be resolved is adopted in the administrative procedure; if the enforcement of a decision may result in a criminal act or is not possible; if a decision is adopted without prior request of the party, and the party has not subsequently given their explicit or implicit consent thereto; if a decision contains irregularities which are under explicit legal regulation specified as grounds for nullity). A decision may be declared null *ex officio* or at the request of the party, the state attorney, or the BiH Ombudsman, at any time.

Finally, there are two entities still upholding the request for protection of legality, a legal remedy abandoned in BiH and the BD as well as in the countries in the Region. In order to protect legality, the state prosecutor may submit a request for protection of legality against a decision adopted in the administrative matter where an administrative dispute procedure is not allowed and court protection is not provided outside the administrative dispute proceeding. The legal consequence of the adoption of the request is revocation of the decision with *ex nunc* effect.

To sum up, the system of extraordinary legal remedies in Bosnia and Herzegovina (like the other provisions of general administrative procedure) is almost completely taken over from the previous regime. No significant amendments have been introduced by any of the (G)APAs. Consequently, the system is burdened with detailed and occasionally obsolete provisions and needs significant improvements.

3.3. Kosovo*

The Law on Administrative Procedure of 2005 (LAP 2005) regulates general issues of administrative procedure. Several shortcomings of that Law have been identified and the new draft has been made, mostly under the auspices of SIGMA (Draft 2015).

The 2005 LAP stipulates several situations that call for an *ex officio* intervention against an administrative act. These include certain cases of invalidity of administrative acts, especially of absolutely and relatively invalid acts.

The LAP of 2005 distinguishes between absolutely and relatively invalid administrative acts. Regarding the absolutely invalid act, any interested party may request the declaration of invalidity of an act by the administrative body (Art. 93/3). More importantly, Art. 93/4 stipulates that the administrative body “competent to decide on the request for redress or on the appeal against an administrative act may at its discretion, or at a request of the interested party, declare an administrative act as absolutely invalid”.

When it comes to relatively invalid acts, Art. 94/3 stipulates, “Competent bodies of public administration, at their discretion, may revoke or abolish a relatively invalid act within the specified timelines laid out by law”.

Administrative bodies can also take action at any time to correct administrative acts which are valid but contain visible inaccuracies and mistakes (Art. 96). This may be done (a) at discretion of the administrative authority and (b) at any time. It should be noted that these corrections of the act could potentially lead to its revocation or abolishment. Art. 108/1 stipulates that material mistakes “in expressing the will of administrative body – when visible – may be corrected at any time by the bodies with the right to revoke/abolish the act”. Such provisions are a clear legal basis for *ex officio* intervention into an administrative act, whose purpose is to align the act with the law.

The LAP of 2005 is not systematic when it comes to the regulation of *ex officio* intervention regarding administrative acts. Legal norms are scattered in various parts of the law and are far from systematic.

The Draft LGAP of 2015 follows the tradition according to which public bodies have a major responsibility for administrative acts they have issued. In that regard, the 2015 Draft does not stipulate any explicit extraordinary legal remedies that regulate *ex officio* interventions into the act after its finality. There is general regulation in section 3 (Annulment and Revocation of the Administrative Act) of Part III (Administrative Actions) Chapter I (Administrative Act) which contains 6 articles (Art. 53–59). *Ex officio*

interventions into other administrative actions – apart from administrative acts – such as administrative contract or control of the provision of public services of general interest, may also take place under certain circumstances. These cases are analysed further in the following paragraphs.

The 2015 Draft distinguishes between revocation and annulment of the administrative act. According to general regulation, an administrative act “... may be annulled or revoked *ex officio* by the public organ that has the competence to issue the act, by its superior organ, or by another organ explicitly determined by law” (Art. 53/1). As stated in Art. 53/1, *ex officio* actions are not reserved just for the body that has issued the act (in general, this is the first instance body), but this can also be done by the superior body that performs the administrative and other control over first instance public bodies. Article 53 stipulates that the right to act *ex officio* towards a particular type of administrative action may be granted to other public body explicitly determined by law. This is especially important for the control of public agencies and other bodies that *sensu stricto* are not a part of central (or local/regional) administration, but enjoy an autonomous or semi-autonomous status and/or are regulated by special legislation. In conclusion, it should be noted that *ex officio* action to annul or revoke an administrative act is the responsibility of a particular public body which may use it without any request from the party, but when there are certain legal conditions. Annulment has the retroactive legal effect (*ex tunc*) while revocation produces legal effects only for the future (*ex nunc*).

Circumstances under which an administrative act can be annulled or revoked are explicitly regulated by the Draft. Unlawfulness of the act is regulated in Art. 52. Cases in which unlawful administrative act must be annulled are regulated in Art. 54/1 while in any other case an act may be either annulled or revoked for the purpose of aligning it with the law (Art. 55/1). Nevertheless, an unlawful beneficial administrative act may not be annulled but only revoked if the beneficiary party acted in good faith (Art. 55/2).

Ex officio actions of a public body can be directed at an unlawful as well as at a lawful administrative act if it is necessary “... because of the change of factual or legal situation or circumstances; or because of other reasons provided by law ...” (Art. 57/1). However, the conditions for revocation of a lawful beneficial administrative act are much stricter and this can be done only if certain legal conditions stated in Art. 57 are cumulatively met. Firstly, revocation is possible only if it is necessary in order to prevent serious danger to the life and health of people or to public safety. Secondly, revocation can be done only if the prevention of serious danger cannot be accomplished by other means which would interfere with the acquired subjective rights or legitimate interests of the party to a lesser degree. Furthermore, in case

of revocation of a lawful beneficiary administrative act, the parties shall be entitled to compensation when they have made financial arrangements which they can no longer cancel, or when cancelling such arrangements will entail suffering a disadvantage which cannot reasonably be asked of them.

Annulment of the act or revocation because of the change of factual or legal situation or circumstances, or because of other reasons provided by law can be done without any time limits. However, the right of an administrative authority to revoke an administrative act due to other reasons is limited by subjective and objective deadlines. The revocation in these other cases may be made within 30 days from the date the public body gains knowledge of facts which justify the annulment or revocation, and no later than five years after the notification about the administrative act (Art. 58/2).

There are several other situations when some form of *ex officio* intervention of the public body may take place. This is especially true when it comes to unilateral termination of an administrative contract and in case of provision of public services of general interest. The following paragraphs explain these cases in more detail.

Regarding termination of the administrative contract, the 2015 Draft stipulates that the public body may unilaterally terminate an administrative contract "... other than a compromise contract, only in order to avoid or eliminate a serious damage to the public interest. In this case, the party, which is not a public body, shall be entitled to compensation of possible damages." (Art. 66/2) Regarding the so-called compromise administrative contracts it is regulated that if a compromise contract is "... inadequate in regard to public interest, or if a subsequent legislative change makes it unlawful, the public organ shall be entitled to terminate the contract unilaterally, with no obligation to compensate the party, except if such change of circumstances is due to organ's action or omission, or if termination is not justified by any objective reasons of public interest." (Art. 66/3) According to paragraph 4, termination of the administrative act in both previously mentioned situations shall be enacted through an administrative act. In this case, the administrative act shall be in written form and shall include the reasoning.

When it comes to the provision of public services of general interest, it should be noted that the regulatory body "... by exercising its supervisory responsibility shall ensure the continuity, uniformity, affordability and adequate quality of service, the transparency of proceedings, and non-discrimination of public service users." (Art. 70/1) This competence of the regulatory body has to be exercised no matter whether the service is provided by a public or private service provider under private law. Such general regulation of Art. 70/1 may lead to an *ex officio* measure aimed at the public service provider

if that is thought necessary to ensure respect of the mentioned public service obligations (e.g. continuity, uniformity, etc.).

3.4. Macedonia

Complete and final decisions in the administrative procedure may be challenged only exceptionally. The previous LGAP stipulated six “extraordinary legal remedies”, following the tradition of the former Yugoslav GAPA: 1) modification and annulment of decision related to administrative dispute, 2) request for protecting legality, 3) annulment and revocation of decision upon official control, 4) revocation and modification of the final decision upon consent or request of the party, 5) exceptional revocation, and 6) declaring a decision null.

The number of legal remedies was reduced in 2015 in accordance with European requirements and standards, (Pavlovska Daneva et al., 2014: 15). Since the request for protecting legality and annulment and revocation of a decision upon official control were outdated, they have been abandoned in the new Macedonian LGAP. The rest of provisions have almost entirely been taken over from the 2005 LGAP. Therefore, the new LGAP stipulates four extraordinary legal remedies, i.e. exceptional cases of revocation and annulment of administrative acts.

The exclusive right to act based on the institute called “modification and annulment of decision related to administrative dispute” belongs to the public authority against whose decision an administrative dispute has been initiated. The authority may, before the finalisation of the dispute, if it accepts all of the requests from the lawsuit, modify or annul its administrative act based on the reasons the court would use to annul such act, if that does not infringe the right of the party in the administrative procedure or of third parties (Art. 121).

Other cases of revocation and annulment of administrative acts may be activated *ex officio* or at the request of the party. Pursuant to the old LGAP, the Public Prosecutor was authorized to submit a proposal for the declaration of a decision null by the provision abandoned in the new LGAP.

According to the new LGAP, an administrative act shall be declared null if there have been severe infringements which impede legal effects to be produced. The act can be declared null in its entirety or partially, *ex officio* (by the body that issued the act, by the second instance body and, if there is no second instance body, by the body authorised by law to supervise the activities of the body that issued the decision), or at the request of the party (Art. 124).

If the party has acquired a right by a final administrative act, and the body that adopted the act considers that substantive law has been applied incorrectly, it may revoke or modify the act in order to harmonise it with the law, only if the party that has acquired a right by virtue of that act agrees, and if that does not violate the rights of any third parties. A decision imposing an obligation upon the party may be revoked or modified with prejudice to the party only upon the party's consent. The final decision that is disadvantageous to the party may be revoked or modified at the party's request (Art. 122).

The enforceable decision may be revoked if it is necessary in order to eliminate a grave and direct danger to human life and health, public security, public order, or public morality, provided that it cannot be done successfully by other means which would affect the acquired rights to a lesser extent and only to the extent necessary for eliminating the danger or for protecting the general public interests (Art. 123). The new LGAP has not taken over from the old Law the provisions on the jurisdiction of the court responsible for deciding in administrative disputes against decisions that are subject to exceptional revocation.

3.5. Montenegro

Ex officio interventions have been regulated in the 2003 LGAP following the former Yugoslav tradition. However, the new APA of 2014 brings a completely new concept to this field, marking a modern path of developing legal protection of citizens in their relations with state.

The rules on a) mandatory annulment of administrative acts, b) annulment and revocation of unlawful administrative acts, and c) revocation of lawful administrative acts are designed in the new Montenegrin APA of 2014. Current name of those interventions, which are actually the instruments available to public law bodies to protect the public interest in different situations ("extraordinary legal remedies"), is not used any more. The number, structure, and regulation of such *ex officio* interventions were similar to their number, structure, and regulation in other countries on the territory of the former Yugoslavia. The new APA introduced clear and innovative regulation of the necessary *ex officio* interventions basing its provisions on the idea that the state is responsible for good administration and is not allowed to shift the burden of responsibility to the citizens, businesses, civic organizations, and other subjects who rely on enforceable and enforced administrative acts, especially after expiration of certain long deadlines.

The concept of declaring an administrative act null and void was replaced by the concept of mandatory annulment of administrative acts. In ten cases, comprising the most serious breaches of law, a public law body or a party may instigate annulment, but only within an objective deadline of ten years after the administrative act became enforceable (Art. 139).³⁰

Unlawful administrative acts may be annulled or revoked fully or partially within three years after becoming enforceable in three cases characterized by rather serious procedural errors.³¹ Unlawful administrative acts may be annulled or revoked within one year after becoming enforceable in case of an obvious violation of substantive law, if the party has been granted certain right (Art. 140).

A lawful administrative act by which the party has been granted certain right may be revoked fully or partially 1) if it is necessary for eliminating a serious and direct danger to human life and health, as well as to public safety, and if that danger cannot be eliminated in any other way, or 2) if the party has not fulfilled a related obligation within the deadline set in the administrative act (Art. 141).

Annulment makes all legal consequences non-existent *ex tunc*, from the very beginning, while revocation makes legal consequences stop *ex nunc*, from

30 An administrative act shall be annulled if:

- 1) it has been issued in the matter under the court jurisdiction,
- 2) it has been issued in the matter that cannot be decided in an administrative procedure,
- 3) its enforcement is impossible, either legally or for other reasons,
- 4) its enforcement constitutes a felony,
- 5) it has been issued as a result of coercion, extortion, blackmail, pressure, or other unlawful activity,
- 6) it has been issued by a public law body without the party's request that was necessary in that administrative matter and which the party subsequently, expressly or tacitly, has not accepted,
- 7) it has been issued by the non-competent public law body or by the public law body without the consent, confirmation or approval of another public law body (when such consent, confirmation, or approval is necessary by law),
- 8) an enforceable act has already been issued in the same administrative matter, by which the administrative matter was decided in a different manner,
- 9) it is based on a court judgment which was finally abolished,
- 10) it contains other error which has been regulated by the law as a reason for mandatory annulment.

31 The APA regulates the following three cases in that regard:

- 1) when an administrative act has been issued on the basis of a false public document or a false testimony of a witness or expert witness, or if it has been issued as a result of a felony,
- 2) when an administrative act favourable to the party was based on the party's false statements that misled the authorized official who conducted the procedure,
- 3) when the decision of the European Court of Human Rights in the identical matter, adopted before the validity of the administrative act, may have impact on legality of that administrative act.

the moment of revocation. The party has a right to compensation only in the case of revocation of a lawful administrative act if revocation is necessary for eliminating a serious and direct danger to human life and health, as well as to public safety, and if that danger cannot be eliminated in any other way (Art. 142).

There is a special *ex officio* intervention which is possible only during the administrative dispute. In such a case, the sued public law body may annul or amend its administrative act during the court proceedings, before the official end of an administrative dispute, on the same grounds as the court would do, if it accepts all the claims presented in the lawsuit, and if the rights of the party or a third person are not affected (Art. 143).

A clear legal position of citizens in all situations and cases of *ex officio* interventions is provided. Introduction of the deadline for mandatory annulment of administrative acts, which is limited to ten years, seems to be an appropriate innovation that balances the interests of the state and citizens. The burden of establishing the circumstances which require mandatory annulment has been clearly designated to public law bodies thus strengthening the culture of accountability for the consequences of neglects and omissions in implementing measures for ensuring the rule of law (Art. 139). All other *ex officio* interventions are necessary and are regulated in a thoughtful manner, strengthening the legal position of citizens, businesses, civic organizations, and other subjects to the reasonable and acceptable degree.

3.6. Serbia

Ex officio interventions were thoroughly regulated in the 1997 LGAP following the former Yugoslav tradition. These interventions were regulated in Chapter XVI (Exceptional cases of annulment, revocation and amendment of the act; *Naročiti slučajevi poništavanja, ukidanja i menjanja rešenja*) of Part III of the Law and there were five of them: (1) amendment and annulment in connection with administrative dispute, (2) annulment and revocation on the basis of supervisory control, (3) revocation and amendment of the act with the consent or at the request of the party, (4) exceptional revocation and (5) declaring the act null and void.

Amendment and annulment in connection with administrative dispute (*menjanje i poništavanje rešenja u vezi s upravnim sporom*) is regulated in Art. 251 of the 1997 LGAP and allows the public body intervene in the

act after the administrative dispute has been initiated if it finds that the administrative court could annul the act. This can be done if the rights of the party or of the third person are not violated by amendment or annulment of the act.

The second *ex officio* intervention in the act is annulment and revocation on the basis of supervisory control (ponišćavanje i ukidanje po osnovu službenog nadzora) regulated in Articles 253 and 254. It enumerates five legal situations when the supervisory body (second instance or other supervisory body) may annul or revoke the act if it finds that material law has been breached. The Law also regulates deadlines, the right of supervisory bodies to annul and revoke administrative acts in the course of supervision, and stipulates the right of the party to instigate an administrative dispute against the decision on annulment or revocation.

Revocation and amendment of the act with the consent or upon request of the party (ukidanje ili menjanje pravosnažnog rešenja uz pristanak ili po zahtevu stranke) is regulated in Art. 255 and allows the public body to revoke or amend an act in force in order to align it with material law if it considers that the law has been breached.

Exceptional revocation (izvanredno ukidanje) is regulated in Art. 256 and allows revocation of the act in exceptional situations if it is necessary for eliminating a grave and imminent danger for human life and health, public safety and public order or public moral, or for eliminating disturbances in the economy if this cannot be achieved by other means that would affect the rights of the parties to a lesser degree. The act can be only partially revoked if it is necessary and the competence for the revocation lies with the first instance body that issued the act or with the supervisory body.

Articles 257 and 258 regulate situations in which the public body is allowed to declare an act null and void. Declaring the act null and void (oglašenje rešenja ništavim) is regulated in Art. 257 which stipulates five situations when this may be done. There is no deadline for this action and the act can be declared null upon an *ex officio* initiative of the public body, but also at the request of the party or public prosecutor (Art. 258/1).

When it comes to the systematics of the legal text, it is worth noting that some *ex officio* interventions placed in Part III of the 1997 LGAP should have been placed somewhere else in the text because these institutes are not legal remedies *sensu stricto*. In several of the mentioned institutes, the initiative can come *ex officio* from the public body, from the party, as well as from other public bodies (e.g. from the public prosecutor, which is a rather peculiar solution in modern public administration).

The LGAP of January 2016 regulates *ex officio* interventions in somewhat different manner. The official explanatory note of February 2016 states the following: “Bearing in mind the perceived inconsistency and lack of transparency in the current LAP in terms of extraordinary remedies, as well as the need for its simplification and redefinition, the special cases of removal and amendment of the act have been envisaged (Art. 175–189).”

Among the special cases of removal and amendment of the administrative act that have been regulated in Part VII of the new Serbian LGAP a particular place belongs to the following: (1) amendment and annulment of the act in connection with the administrative dispute (menjanje i poništavanje rešenja u vezi sa upravnim sporom – Art. 175); (2) reopening of the procedure (ponavljanje postupka; Art. 176–182); (3) annulment of the final act (ponišavanje konačnog rešenja; Art. 183); (4) revocation of the act (ukidanje rešenja; Art. 184); (5) annulment, revocation or amendment of the act at the request of the ombudsperson (ponišavanje, ukidanje ili menjanje pravosnažnog rešenja na preporuku zaštitnika građana; Art. 185).

This part of the new LGAP also contains several general articles regulating deadlines (60 days) that have to be followed in these special cases (Art. 186), legal consequences of the annulment (*ex tunc*) and revocation (*ex nunc*) of administrative acts (187), remedies against decisions rendered in these special cases (188), and the general duty of notifying the competent body when another body becomes aware of some of the reasons for annulment, revocation, or reopening of the procedure (189).

Amendment and annulment of the act in connection with the administrative dispute (menjanje i poništavanje rešenja u vezi sa upravnim sporom; Art. 175) is regulated in the same manner as in the previous LGAP. If an administrative dispute has been initiated in due time, the administrative body that has issued the act can amend or annul it if it finds that the reasons stated in the lawsuit could be accepted by the administrative court and could lead to annulment or amendment of the act. This competence is restricted by the procedural rights of parties and third persons.

Reopening of the procedure (ponavljanje postupka) is regulated in 7 articles of the new LGAP (Art. 176–182). Reopening of the procedure is allowed when the procedure has finished and the decision rendered is final (cannot be challenged by an appeal). The LGAP stipulates 12 reasons for reopening of the procedure. Some of them are limited by the parties’ inability to present those reasons during the finished procedure (only if the parties, without fault of their own, could not present those reasons previously in the proceedings). Request for reopening may be lodged by the party, while the public authority that rendered the decision can reopen the procedure *ex officio*. Reopening

of the procedure is limited with subjective and objective time frame. Subjective deadline is 90 days from the moment party became aware of one of the reasons for reopening, while objective deadline is 5 years from official notification about the act. Among the reasons for reopening of the procedure not listed in the 1997 LGAP, the new LGAP has included rulings of the Constitutional Court of Serbia and of the European Court of Human Rights, if in a particular administrative matter these courts (a) have found a violation or denial of human or minority rights and freedoms guaranteed by the Constitution, and failure to annul the disputed decision, and (b) if the European Court of Human Rights has found that in the same administrative matter the rights and freedoms of the applicant have been violated or denied. Such solutions should contribute to better protection of human and minority rights in the administrative procedure. However, it has to be noted that the procedure can take a rather long time because of the need to reopen the procedure and solve the same administrative matter once again.

Annulment of the final act (ponišćavanje konaćnog rešenja; Art. 183) is reserved for the cases of grave irregularities that have taken place in deciding on the administrative matter. There are 11 situations listed in Art. 183/1 in which annulment of the final act may take place. The act can be annulled in its entirety or partially. The authority to annul the act is reserved for the second instance administrative body or another supervisory body, and if they do not exist, the responsibility for annulment rests with the first instance administrative body that issued the act.

Revocation of the act (ukidanje rešenja; Art. 184) was previously known as an exceptional revocation (vanredno ukidanje) and was regulated in the 1997 LGAP. It can be initiated by the party and *ex-officio* by the administrative body when (1) revocation is necessary to avoid serious and imminent danger to life and health, public safety, public peace and public order or in order to eliminate disturbances in the economy, if the purpose of revocation cannot successfully be remedied by other means that affect the acquired rights to a lesser degree; (2) it is required by a party at whose request the act has been issued, and revocation is not contrary to the public interest or the interest of third parties and (3) it is prescribed by special laws.

Annulment, revocation, or amendment of the act upon request of the ombudsperson (ponišćavanje, ukidanje ili menjanje pravosnažnog rešenja na preporuku zašćitnika građana; Art. 185) is a special case of intervention in the act that has already started to produce legal effects. This institute was not regulated by the 1997 LGAP. It is a new instrument which allows ombudsperson to intervene in the administrative proceedings. Art. 185 states that "upon the recommendation of the Ombudsperson the administrative body

may by its new decision – in order to comply with the law – annul, revoke or amend its previous final act if the party whose rights or obligations have been decided upon, as well as the opposing party, have agreed to it and if it does not offend the interest of third parties.” Although this regulation enables the Ombudsperson to interfere in the administrative procedure, the margin of these interventions is rather limited. Firstly, the administrative authority is not obliged to act upon the recommendation of the Ombudsperson (the term “may” is used). Secondly, party to the procedure (as well as the opposing party if he/she exists) has to agree with the intervention in the final act. Thirdly, the intervention (annulment, revocation, or amendment) must not be contrary to the interest of the third party.

Most of the legal institutes regulated in Part VII of the new LGAP are of dual nature in the sense that they can be initiated by the party as well as *ex officio* by the administrative body that solved the administrative matter in by other administrative authorities (e.g. second instance or supervisory bodies or ombudsperson).

By regulating the administrative contract, Serbia has introduced a legal institute that has not previously been regulated systematically in the Serbian administrative law. This regulation stipulates that certain type of *ex officio* action may also be taken against an administrative contract as a particular type of administrative action. Article 24 of the LGAP of February 2016 regulates three situations in which an administrative body may unilaterally take actions towards the termination of previously concluded administrative contract. This can done in the following cases: a) if the contracting party does not give their consent to amend the contract in case of the *rebus sic stantibus*; b) if the contracting party does not fulfil contractual obligations; and c) if the termination of the contract is necessary in order to remove imminent and grave danger to the life and health, public safety, public order, or great economic disturbance. Case described under c) is possible only when this cannot be achieved by other legal instruments which would have minimal effect on the acquired rights. The other contracting party does not have such an instrument at their disposal. Instead of unilateral contract termination, they may only lodge an objection (*prigovor*) if the administrative body does not fulfil contractual obligations (Art 25). So, the public body has greater responsibility than the party with regard to the administrative contract.

According the new LGAP, *ex officio* interventions cover a variety of situations in which the administrative act may be – under certain circumstances – annulled, revoked, or amended after it started to produce legal effects. The distinction between these options mainly depends on the level of illegality of the administrative act. Annulment is reserved for the cases of grave

illegality and has *ex tunc* legal effect, while revocation is reserved for the cases of illegality that have to be corrected with the effect only for the future (*ex nunc*).

3.7. Comparative Overview: Austria, Slovenia, Croatia

3.7.1. Austria

Legal remedies in Austria seem to be understood as an issue of substantive law rather than procedural law since legal remedies are a way of modifying merit decisions (Hofmann, Schneider and Ziller, 2014: 140–142). In terms of constitutional principle of finality and *res iudicata* (overcoming even legality in order to serve the principle of legal certainty) it means that legal remedies that revoke, modify, or annul final administrative decisions are allowed:

- a) only exceptionally, for most severe procedural errors;
- b) on parties' motion in order to pursue their subjective legal protection, but not or very exceptionally, *ex officio* or in the form of objective protection of the public interest (to protect legality).

Hence, only in certain cases, the federal and Land bodies may claim objective prejudice of rights and submit recourse against an administrative decision, similar to regular legal protection by the appeal and lawsuit lodged with the administrative court, even after its finality, as *ex officio* legal intervention.

In Austria there is only one *ex officio* intervention stipulated by its GAPA (AVG), modification and remedying *ex officio* (Art. 68). There are three main possible effects in decision-making: modification, revocation, or annulment of the challenged decision.

This intervention is admissible only if a decision is not subject to appeal with strongly limited exceptions (according to Art. 69 and 71). It has to be stressed that the right of an authority to revoke or restrict a permit on the basis of administrative regulations by a proceeding separate from the appellate proceedings remains unaffected. Parties can – despite the intervention to be applied *ex officio* by a rule – also suggest its use, but frivolous requests for administrative review or modification are punishable (under Art. 68 and 35). All effects with regard to modification or revocation and nullity are limited by a deadline of three years.

Competence is given to the respective issuer of a decision or higher body (devolutive or non-devolutive effect), and to other agencies when taking actions in the public interest (defined as necessary and inevitable for eliminating grievances resulting in detriment to human life or health or for avoiding severe damage to the economy). Administrative decisions may also be declared void *ex officio* by the higher authority having jurisdiction in the matter in exercise of its right of supervision, if such rulings (1) have been issued by an authority not having jurisdiction or by a panel whose membership is contrary to law, (2) would result in a situation contrary to criminal law, (3) are in effect impossible to implement, and (4) an error regulated in a sector-specific law.

3.7.2. Slovenia

In the Slovenian administrative procedure, further “extraordinary legal remedies” (Art. 260–280 of the GAPA) are merely a corrective measure in comparison to the appeal and reopening of the procedure rather than a rule, considering that in order to protect stability no interference with complete or final decisions is recommended. Such “remedies” may be applied exceptionally, not because of the irrevocability of relations based on protection of acquired rights, but always exclusively because of the need to ensure constitutionality or legality (Androjna and Kerševan, 2006: 577–604). The GAPA places legality above substantive finality. Thus, in order to protect constitutional rights effectively, it is the opinion of the Constitutional Court that the exhaustion of legal remedies is not required if the Constitutional Court itself is to decide on the lacking legal remedy.³² Besides regular appeal and extraordinary renewal/reopening of the procedure, there are four additional “legal remedies” in the GAPA that can be initiated *ex officio* or *ex officio* and at the party’s request.

The purpose of annulment *ab initio* or modification of a decision concerning administrative dispute pursuant to Art. 273 of the GAPA is similar to the institution of replacement decision in the appellate procedure. It is a legal remedy to improve procedural economy, a form of mediation or friendly solution within substantive law whereby the defendant party – when it is obvious due to the assertions in the appeal, that it will be successful in administrative dispute – avoids litigation. Yet according to the GAPA, the body must grant the request in its entirety since partial granting still calls for

32 In such case, the decision is taken by the court irrespectively of the categorisation of the procedure (constitutional complaint or decision on legal remedy, case Up-227/96). Cf. Kulikowski vs. Poland, No. 18353/03, Antonicelli vs. Poland, No. 2815/05, both of 19 May 2009.

the continuation of the administrative dispute. This cannot be done to the detriment of third parties (e.g. accessory participants).

The annulment *ab initio* or annulment of a decision through the supervisory right (Art. 274) is a tool for the line ministries (or supervisory bodies superior to those issuing the decision) to ensure legality in a certain area. Considering the importance of supervision, the supervisory right exists even if the law does not explicitly define the competent authority (e.g. the supervisory right over an inter-ministerial commission is held by the Government and that over the information commissioner by the National Assembly). The procedure is initiated *ex officio* or at the request of the party, the state prosecutor, the state attorney, or an inspector. The decision can be annulled *ab initio* within five years, or within one year from issuing in cases of violation of jurisdiction (subject matter, territorial, collective decision) or interferences with substantive finality (a different decision is issued in the same matter). The supervisory body can also annul a decision in the event of evident violation of substantive regulation.

The GAPA also provides for extraordinary annulment (Art. 278), which is not intended to protect legality since it can annul even a legal decision if its execution, by guaranteeing the right of the party, would interfere with the public interest (protection of life, health, property, the environment, public order, and safety). Quite logically, extraordinary annulment is (possible) reasonable only to the point where the execution of a given right interferes with the public interest. Extraordinary annulment is carried out by the supervisory body, whereby the party who thus lost its legally granted right has the right to compensation.

Nullity as a completely separate institution has its rationale in the correction of truly severest possible errors. It can be proposed immediately after issuing of the decision by any person, given that the establishment of nullity and thus the removal of the consequences of such a decision are, sometimes, in the interest of constitutionality (e.g. if the decision is issued by an administrative body belongs to court jurisdiction, it violates the principle of the separation of powers; more in: Androjna and Kerševan, 2006: 592). Likewise, a decision is null and void if it has been issued at the request of the party and the party has not subsequently consented, explicitly or tacitly, to this; if the decision cannot be executed; if it has been issued by force, etc. (Art. 279). The decision may be declared null and void partially or entirely with a new decision.

According to administrative statistical data, extraordinary legal remedies provided by the GAPA are seldom applied in practice. In 2008, for example, out of 5 million decisions issued at first instance by administrative units and ministries (that provided data to the Ministry of Public Administration),

approximately 12,000 were challenged with renewal of the proceedings, 500 were annulled *ab initio* or annulled in an already initiated administrative dispute, 1,000 were annulled *ab initio* or annulled through the supervisory right, 270 were subject to extraordinary annulment, and only 13 were declared null and void.

3.7.3. Croatia

Croatian legislation has undergone considerable changes when legal remedies are concerned. The old LGAP provided six “extraordinary legal remedies”, taken over from the former Yugoslav LGAP and by consequence identical to those in the other former Yugoslav countries: 1) modification and annulment of a decision related to administrative dispute, 2) request for protecting legality, 3) annulment and revocation of a decision upon official control, 4) revocation and modification of the final decision upon consent or request of the party, 5) exceptional revocation, and 6) declaring a decision null.

There were many objections to the existence of such a large number of so-called extraordinary legal remedies because they rendered the entire system less transparent and difficult to understand. They also decreased the level of confidence the parties had in administrative procedure since there was a great number of possibilities for the annulment of such acts. The situation was harmful for legal security and citizens’ rights.

In order to reduce *ex officio* interventions in administrative acts, the new LGAP provides for only two of them: 1) annulment and revocation of an unlawful act, and 2) revocation of a lawful act according to which a party has acquired certain right. Apart from them, it is also 3) possible to declare the act null and void.

If the administrative act is unlawful, it can be annulled (all effects produced by the act have to be annulled and everything that has been received by the parties has to be restored – the *ex tunc* effect) or revoked (legal consequences of the act are not removed but the act has no effect in future – the *ex nunc* effect). If the party has received certain rights, the act can be annulled only if it has been issued by a public body without jurisdiction, without the approval of the other authority, or if there is another legally effective decision in the same matter. If the act represents a severe breach of material law, the public authority may choose whether it wants the act to be annulled or revoked. If the administrative matter involves two or more parties with opposing interests, the decision can be revoked only with the consent of the opposing party (Art. 129).

If the act is lawful, revocation is the only option, and this can be done in three different cases: a) the revocation is permitted by law, b) the administrative act contains a reservation of revocation when the party has not fulfilled his/her obligation established by the administrative act or the said obligation has not been fulfilled within deadline, or c) the revocation is necessary in order to prevent serious and immediate danger to human life and health or to public safety, and this cannot be done by other means which would interfere with the attained rights to a lesser degree (Art. 130).

An act may be annulled or revoked by the issuing body, by the second instance body or by the authority supervising the body which has issued the act. The annulment or revocation can be initiated by the party, an authorized state body or *ex officio*. Unlawful decisions may be annulled within two years and revoked within one year following the date of delivery to the party (Art. 131).

The new LGAP regulates declaring the act null and void. This institute is used in case of most severe errors (e.g. the act issued by a public body deals with the matter that falls within court jurisdiction, the enforcement of the act would be a felony). There is no time limit for declaring the act null and void. This can be done by the body which has issued the act or by the supervising authority, at the request of the party or *ex officio* (Art. 128). It has to be noted that such possibilities reduce the level of legal predictability and reliability of administrative acts.

3.8. Conclusions and Recommendations

One of the major problems with the general administrative procedure laws rooted in the Yugoslav legacy was the concept and number of so-called extraordinary legal remedies. There were too many cases in which various state bodies were entitled to intervene even into valid and lawful administrative acts. The notion of “remedy” caused confusion, and there were many opportunities to annul or change administrative acts, which caused legal insecurity and many other harmful effects. In reality, that meant the state wanted to ensure that one state body or another found and corrected any error of other state bodies, regardless of the position of citizen. Instead of public responsibility, such a situation produced a firm alliance of state bodies which were able to act against citizens, not on their behalf. Legal security and predictability are endangered in a situation where a wide array of *ex officio* interventions are possible, and especially in a situation of massive usage of such interventions.

The main recommendations regarding regulation of *ex officio* interventions are:

1. There is utmost need to reduce the number of *ex officio* interventions into valid administrative acts and the frequency of their usage in practice.
2. Interventions into valid unlawful administrative acts are necessary, but it would be advisable to delimit them with appropriate deadlines.
3. Although interventions into lawful valid administrative acts are also necessary under certain conditions, such conditions have to be precisely regulated and accompanied by the party's right to compensation.
4. It is recommendable to precisely regulate the cases and reasons for annulment and revocation of administrative acts. Annulment means that all legal consequences become non-existent *ex tunc*, from the very beginning, while in a case of revocation legal consequences stop *ex nunc*, from the moment of revocation.
5. As a special case, *ex officio* intervention which allows a public law body to annul or amend its own administrative act during the administrative dispute, on the same grounds as the court would do, if such a body accepts all claims presented in the lawsuit, and if the rights of the parties or third persons are not endangered, may be acceptable.
6. It is of special importance to train and educate civil servants in culture of public responsibility which warns them that interventions into valid administrative acts may cause serious damage to the legitimacy of public administration.
7. Again, the establishment of an efficient monitoring system which gives insight into the usage of *ex officio* interventions is required.

4. ALTERNATIVE DISPUTE RESOLUTION

Possibilities for alternative dispute resolution in administrative procedures (settlement, mediation, arbitration, conciliation, etc.; description of possibilities, usage and promotion in practice, etc.).

4.1. Albania

New legislation, such as the Code of 1999 and Code of 2015, and the establishment of administrative judiciary in 2013 led to a more progressive approach to some institutes than the one known in some other Western Balkan countries. Still, implementation gaps are reported and attributed to numerous reasons, the most conspicuous of which include the low capacity of public administration and newly established courts with regard to special administrative values and topics (OECD; 1997: 126, etc.).

The main characteristic of Albanian regulation is a broad concept of the 1999 CAP, whose scope encompasses administrative contracts and all other activities of public administration, as well as – partly – labour relations and misdemeanours. Both laws (Codes of 1999 and 2015) incorporate the notion of administrative contract, even though barely regulated. Contracts stimulate participative relations in public administration.

Albania is also familiar with the guarantee act or (written) act of assurance as stipulated in Art. 103 of the 2015 CAP whose purpose is to increase trust and legal certainty and reduce the number of disputes. However, prior to its issuance, opposing interests must be acknowledged through a hearing of the interested parties.

There are no empirical data available on the usage of these institutes and their effectiveness.

There are no special institutes addressing procedural mediation. This is also true, unlike in the majority of other Western Balkan countries, for substantive settlement in administrative procedures. The new CAP, adopted in 2015, addresses dispute settlement only in Art. 126 dealing with dispute between

the contracting parties, which stems from an administrative contract, stipulating their disputes are in the competence of the court in charge of administrative matters.

The 2015 CAP does mention negotiations, but rather narrowly in the chapter on ensuring impartiality of public administration. Pursuant to Art. 30, definition of partiality includes the cases of public officials (or members of collegial administrative authorities) negotiating their future employment in the private sector or any other form of relations with the private interests, after leaving the service.

In the chapter on legal remedies, the 2015 CAP allows amendment of a decision disputed by the competent authority, be it first instance or second instance body. Pursuant to Art. 137: “When the competent public body considers that the appeal is admissible and fully founded, it shall annul or amend the appealed act by a new administrative act, or respectively issue the rejected act as required by the party”.

With regard to alternative dispute resolution (ADR), the right to appeal is exercised through a formal or informal request (Çani, 2012: 17–19). Based on Art. 136 of the 1999 CAP, the latter allows a (more) amicable dispute resolution. Such requests are not subject to any time limit or procedural criteria, unlike the classical or formal appeal. Nevertheless, the claimant has to receive a reasoned answer (naturally, not in the form of a formal decision) within one month from the day the request was filed. Prior to that, the administrative body which has received the informal request, informs the claimant of the legal effects of this request, especially of the distinction between the informal request and administrative appeal. Informal requests suspend neither the effects of the administrative act nor the expiration of deadlines. The informal appeal thus serves as a means of communication and interaction between public administration and companies and other parties to administrative disputes. Nevertheless, it does not suspend the execution of the administrative act nor has other legal effects.

These provisions have not been transferred to the CAP of 2015 but could serve as model rules in order to tackle both types of appeals and disputes effectively. It can be achieved if the party is guaranteed not to be led astray by elaborating informal issues as part of good administration and thus (not) diminishing the party’s formal legal and judicial protection.

At the judicial level, i.e. in administrative dispute, subsidiary use of adjudication procedure leads to further possibilities for amicable dispute resolution. However, according to the available external and internal evaluation, the Albanian administrative justice system lacks operational functioning of the courts. One cannot expect quick developments in that regard, given the fact

that there was no regulation of administrative procedure until 1999 and no administrative justice system until 2013.

The Albanian ombudsperson (People's Advocate) may issue a recommendation with regard to disputes in administrative matters if the party lodges a complaint (OECD, 1997: 129). It is a constitutional institution, which represents external but informal control of public administration. Thus, the Advocate's primary role does not include mediating disputes between private parties and public authorities (as in most countries worldwide).

4.2. Bosnia and Herzegovina

In Bosnia and Herzegovina, there is a fact of two rather problematic dimensions in the field of ADR and in administrative procedures in general. Bosnia and Herzegovina is faced with dispersed and highly traditional regulation of administrative procedures at all levels, accompanied by several structures of rather uncoordinated public administration systems and authorities.

The former Yugoslav GAPA of 1956 is still present in BiH pursuant to a federal decree of 1992 and four new GAPAs adopted later on. The latter follow the spirit of the previous law and the state political and administrative structure of Bosnia and Herzegovina. Smaller amendments have been adopted in all structures and laws of minor effect with regard to reconceptualization of the old culture and over formalism. It is obvious from approximately 300 articles in each of the GAPAs but even more so in purely unilateral, classical administrative decision-making. There have been several debates on necessary changes, such as on the progressive reduction of formality and on legal remedies but to no avail in valid legislation. Administrative contracts have not become a topic of the discourse on new GAPAs in BiH yet.

ADR concepts are not recognised except in traditional settlements by the GAPAs and in administrative disputes. Settlements between opposing private parties are substantive. Decisions can be amended in compliance with the parties' claims if these are recognised as grounded in appellate proceedings.

Furthermore, there is an "extraordinary remedy" contained in all the GAPAs serving as a semi settlement: modification and annulment of decision related to administrative dispute. This remedy amends or annuls a decision if an administrative body recognises its challenged act as illegal within administrative dispute. However, there are no available data on the usage of this solution.

The traditional setting is found in administrative dispute, where subsidiary adjudication procedure is applied with limited options of ADR, taking into account that if public authorities are sued, they are not authorised to negotiate since substantive law defines legal decision rather strictly. Administrative disputes are conducted in regular courts and no autonomous administrative courts have been established at any level of authority or territorial structure of Bosnia and Herzegovina. Furthermore, the judges are not trained or and there is nothing to facilitate parties' intercommunication and settlement.

The public interest cannot be disregarded in any case (of settlement and legal remedies within administrative proceedings and in courts). A settlement can be concluded only between private parties without endangering the public interest (or interests of third parties).

There are no special institutes supporting mediation or other forms of reconciliation of interests between administrative authorities and citizens or other parties to the procedure. Ombudsmen as potential mediators do exist in Bosnia and Herzegovina, but again within most traditional limits, pursuing human rights via general recommendations instead of proactive mediation (as in most other countries).

4.3. Kosovo*

In Kosovo*, the GAPA adopted in 2007 is still in force. A new draft law has been in parliamentary procedure. This Draft introduces certain institutes whose aim is to improve citizen-centric public administration. The new law is drafted in the broadest sense (Art. 2 and 3), incorporating not only traditional unilateral decision-making but also public services, real acts, and administrative contracts (Art. 60–68, with explicit provision of disputes resolution in administrative dispute form). However, there is neither explicit provision devoted to ADR nor to settlement between private parties with opposing interests.

On the other hand, the Draft contains a special principle (Art. 10) of de-bureaucratization and efficiency of the administrative proceedings.³³ Art.

33 The Draft GAPA of May 2015, Art. 10:

„1. An administrative proceeding shall not be tied to specific form unless otherwise provided by law.

2. An administrative proceeding shall be conducted as fast as possible and with as little costs as possible, for the public organ and for the parties, but at the same time in such a manner as to obtain everything that is necessary to a lawful and effective outcome.“

26 and 27 on accountability of responsible officials are of interest to ADR concept. In addition, Art. 33 on the points of single contact stipulates *inter alia* that their task is to advise the applicant and inform him/her with special focus on the means of legal remedy against a dispute.

With regard to legal remedies, there is the principle (Art. 13) of party's right. The Draft defines the appeal, the complaint, and reopening of the procedure (Art. 124–142). The exhaustion of remedies is a preliminary requirement for any dispute before a court competent for administrative disputes. In the appellate procedure, pursuant to Art. 131, first instance authority must review (if procedural prerequisites are fulfilled) the lawfulness and expediency of the challenged administrative act and further, with a new administrative act, annul or amend the challenged act or issue the refused act, as requested by the party. The superior appellate body can amend the decision if the appeal is upheld.

Administrative complaint (Art. 136–139) is oriented towards ADR goals, since it may be lodged against real administrative acts or their omission, with special provision regarding public services of general interest. The complaint either suspends the progress of the administrative proceeding, during which the challenged procedural action or inaction occurred, nor affects the validity of administrative acts and administrative contract issued by the collegial body as the result of this proceeding.

Such fundamental principles and rules could serve as the first step towards elaboration of ADR mechanisms in the future.

Until 2010, administrative disputes had been conducted only in one instance of the Supreme Court with few options of legal protection. In 2010, general legislation on courts was adopted and further amended but without establishing separate administrative judiciary. Administrative disputes are therefore heard by regular basic court in Pristina in the first instance and the Appellate Court in the second instance. Two-tiered proceedings should enable more effective dispute settlement.

In practice, no exact empirical data on disputes and their resolution are available. However, it is regularly found in different assessments that administrative and court proceedings are excessively long, which is problematic not only in Kosovo* but also in the whole Region. This is so mainly because of unsatisfactory number of judges and their lacking knowledge in specialised areas. Moreover, there is no training on ADR reported to be developed and organised.

4.4. Macedonia

Macedonia adopted its GAPA in 2005, and amended it several times in order to follow the trends and recommendations of the EU (Todevski, in Apelblat, 2011: 25–29). The new GAPA was adopted in July 2015. Its scope encompasses all administrative actions: adoption of administrative acts, conclusion of administrative contracts, and protection of the users of public services. Contracts are regulated in more detail in Art. 98–101.

The 2005 Law has defined settlement (Art. 137) as an agreement between private parties with opposing claims without endangering the public interest. The same provision is included in the new Law (Art. 55).³⁴

Similarity between both laws is also found in provisions on legal remedies. Pursuant to Art. 235 and 236 of the 2005 GAPA, in an appellate procedure even the first instance body can amend and replace its own challenged decision if it finds that the appeal has merit. The GAPA of 2015 (Art. 104–113) grants the right of appeal in the same manner as the 2005 Law. Art. 107 of the new Law stipulates that the first instance body shall review an appeal if it is not only admissible but also justified. If so, it shall replace the administrative act disputed in the appeal by a new act. Further provisions define speedy procedure and e-communication.

The new Law introduces complaint in public services and other public administration activities (Art. 116–120). Among the so-called extraordinary remedies, the 2015 GAPA stipulates “exceptional” cases of revocation and annulment (Art. 121–125). Moreover, the new Law preserves amendment and annulment of an administrative act in relation to an administrative dispute (Art. 117), similar to reversing and revoking of an administrative act in relation to an administrative dispute (Art. 261 of the 2005 GAPA).³⁵

34 „(1) Should two or more parties with opposing requests participate in the administrative proceeding, the responsible official shall put all the efforts in the course of the proceeding that parties be reconciled, either completely or at least in respect to specific disputable issues. (2) Settlements must always be clear and precisely determined and should not be to the detriment of the public interest, or legal interest of third persons. The responsible official shall take into account those issues *ex officio*. Should it be determined that the settlement may be to the detriment of the public interest or legal interest of third persons, the public authority in charge of the proceeding shall not agree with the result of the settlement and it shall render an administrative act in that respect. (3) Settlements shall be written down in an official record on settlement, and they shall be deemed concluded when the parties, after reading the report on settlement, affix their signatures to the report. The certified transcript of the report shall be given to the parties, if so required by them. Settlements may also be concluded in the form of an administrative contract. (4) A settlement shall have legal validity of an enforceable administrative act adopted in the proceeding.“ (the GAPA 2015, Art. 55)

35 The GAPA 2005, Art. 261: „The authority against whose decision an administrative dispute has been initiated on time, may, before the finalization of the dispute, revoke or reverse its

Administrative disputes are based on the Administrative Disputes Act and conducted by special administrative courts since 2006. There are the first instance courts and appellate Higher Administrative Court. The exhaustion of the appeal or complaint is a prerequisite for any dispute before the competent court. The Supreme Court is competent only for extraordinary remedies as defined by the ADA amended in 2010. The excessive length of procedures is still the most grievous problem in practice.

The Ombudsman acts as human rights protector in administrative affairs. However, he is not recognized as the most effective mediator in relations between public administration and private parties. No precise empirical data are available for assessment of effectiveness of ADR potentials in Macedonia.

4.5. Montenegro

Montenegro adopted its new APA in December 2014. It will enter into force on 1 July 2016. Main novelties in the new APA include the broadened definition of administrative matter and act, including administrative contracts (Articles 27–30); guarantee act (Art. 20) and complaint in public service delivery and other activities (Articles 35, 137 and 138). These forms can be treated as indirect ADR. However, their applicability is questionable since the APA mostly refers to regulation by special laws.

In a narrower sense, the new APA pursues the traditional setting, not acknowledging mediation or other forms explicitly (not even by guiding provisions to special fields and substantive law). Art. 103 regulates settlement by stimulating the opposing parties to reconcile but not to the detriment of the public interest.

There are several legal remedies adding value in terms of enhanced legal certainty. Articles 118–143 stipulate: (1) appeal, (2) reopening of the procedure, and (3) complaint. The Law also stipulates a few *ex officio* interventions. In comparison to the previous Law, *ex officio* interventions are regulated more precisely.

decision based on reasons for which the court could revoke such a decision, if it upholds all claims stated in the complaint and if thereby it does not violate the rights of any party or third persons in the administrative procedure.“

The GAPA 2015, Art. 117: „The public authority whose administrative act is subject to a timely initiated administrative dispute may, before the finalisation of the dispute, if it accepts all requests of the lawsuit, annul or amend its administrative act based on the reasons for which the court could annul the challenged administrative act, if that does not infringe the right of the party in the administrative procedure or of a third party.“

Provisions on legal remedies allow appellate bodies to amend the decision challenged in compliance with appellant's arguments if these are upheld (Art. 127). The first instance body may change its act when an appeal is lodged (Art. 125). An appeal can be withdrawn or even waived in advance to reach immediate finality (Art. 122).

There is Art. 143 on amendment or annulment of administrative act within administrative dispute. The sued public law body may annul or amend its administrative act during the court proceedings, before the official end of an administrative dispute, on the same grounds as the court would do, if it accepts all the claims presented in the lawsuit, and if the rights of the party or a third person are not affected (Art. 143).

Empirical data are only partially available. The system of judicial review by the Administrative Court of Montenegro (established in 2005 to replace prior regular courts competent in administrative-judicial review based on Administrative Disputes Act adopted in 2003) and the Ombudsman are assessed as traditional with regard to administrative matters. This means that regulatory framework does not pursue the goals and forms of ADR.

4.6. Serbia

New Serbian GAPA of 2016 preserves the traditional concept of administrative procedure regulation. The key step forward with regard to ADR is the introduction of the administrative contract. The new law embraces some novelties which are also connected to ADR, such as guarantee acts (Art. 18–21), administrative contract (Art. 22–26), administrative activities, provision of public services, complaint (Art. 25, 28, 32, 147–150). A new and very important role is given to the Protector of Citizens (Ombudsman) (Art. 185). The principle of irrevocable decision is also worth mentioning, since it further enhances legal certainty.

The GAPA of 2016 has preserved the settlement between the opposing parties (Art. 99) and modification of a decision in the appellate phase of proceedings by the first instance and the appellate bodies (Art. 165, 172 and subsequent). Parties may waive their right of appeal, which leads to immediate case resolution (Art. 156). Settlement is legal only between the opposing parties. Mediation or any other ADR methods are not recognised in other provisions on unilateral decision-making. Mediation is regulated by the Mediation Act (Official Gazette of the Republic of Serbia, no. 18/2005), but without any effect in administrative matters.

There are special laws which may serve as a basis for the ADR, such as the Public–Private Partnership and Concessions Act. This Law allows the parties to stipulate arbitration as a means of dispute resolution.

ADR is more broadly acknowledged and admissible in administrative dispute, with *mutatis mutandis* usage of civil procedure law (Cucić, 2011: 50–73). Pursuant to Art. 5 of the ADA, administrative bodies must protect the public interest. The Administrative Court in Belgrade, which has three branch offices, was established in 2010. The Supreme Cassation Court decides on appeals. Both courts have mainly cassation competences.

The Ombudsman (Protector of Citizens) was established in 2007, based on the Constitution and the Law of 2005. The Ombudsman is human rights protector but cannot act as a mediator between public administration and citizens. However, the Ombudsman deals with citizens' complaints or may initiate *ex officio* informal control over the legality, appropriateness, and fairness of administrative conduct. Statistics reveals that there are approximately 2,000 cases resolved by the Ombudsman annually. The Ombudsman issued recommendations to respective public bodies in 187 cases in 2011 and 229 in 2010, mostly about administrative silence or excessive length of proceedings. Approximately one half of recommendations have been realised.

Although Serbia has developed some ADR-like solutions by the GAPA of 2016, there is still room to develop proper ADR solution in line with European standards and trends.

4.7. Comparative Overview: Austria, Slovenia, Croatia

4.7.1. Austria

In Austria, regulation of administrative procedures is still predominantly traditional, including rather unilateral decision-making without systemic application of ADR in general law (AVG), but developed by sector-specific laws, especially in the environmental field (more in: Köhler, 2015). There are attempts to support ADR in judiciary. A lot of attention has been given to notice and comment procedures and to ADR in the procedures of preparation and adoption of general administrative acts or subsidiary legislation. ADR as a reconciliation of contradicting legal interests is otherwise eligible in civil proceedings but highly limited in administrative relations (Dragos and Neamtu, 2014: 390).

The AVG regulates two main forms of ADR in broader sense. First, Art. 43/5 stipulates: "If two or more parties have conflicting claims, the official shall, in so far as is possible, endeavour to reconcile such claims with the public interests and the interests asserted by other parties." This provision is subsequent to so-called settlement in substantive sense. Resolution of the dispute is admissible exclusively between opposing parties. Second, upon the appeal, an appellate authority may modify a decision in line with the appellant's request (Art. 66 of the AVG).

There are particularities of environmental impact assessment which some claim to be part of individual unilateral proceedings. They are in line with the Aarhus Convention (1995) and the Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. In addition, the 2000 Environmental Impact Assessment Act explicitly defines mediation procedure among parties, upon initiation of project and confirmed by an authority within legal boundaries.³⁶ However, administrative courts usually rule (as in cases 96/07/0122 of 10.7.1997 or 99/07/0163 of 27.6.2002), that the failure of the authority to support an amicable settlement in cases when environmental impact assessment is omitted does not constitute a relevant breach of procedural rules. There are problems with regard to the phases of mediation proceeding. There are two of them: (1) the agreement on the instigation of a mediation procedure, and (2) the agreement at the end of the process. There is also the issue of integrating the mediation result into the administrative act.

Further, there is settlement regulated by the Industrial Act (Art. 357), the Waste Management Act (Art. 45), and the Water Act (Art. 60 and 111), usually under private law regime (Köhler, 2015). In addition, so-called waivers to certain substantive rights are taken as an extrajudicial settlement (pursuant to Austrian General Civil Law Code, Art. 1380). Austria has also adopted the Act on Mediation in Civil Matters upon which opposing parties take part in the mediation procedure led by consensually set mediator.

Broadened usage of mediation and settlement is to be expected, especially because following the 2014 reform parties have alternative of challenging an

36 The part on Hearing of the parties and further procedure, Art. 16: „(1) The authority shall hold a hearing of the parties covering all applicable administrative provisions ..., (2) If major conflicts of interest between the project applicant and the other parties involved or affected are revealed in the course of the procedure, the authority may interrupt it for a mediation procedure upon request of the project applicant. The results of the mediation procedure may be forwarded to and considered by the authority, within the limits of statutory possibilities, in the rest of the development consent procedure and in the decision. Further agreements between the project applicant and the parties involved or affected may be documented in the administrative order. The project applicant may submit a request on the continuation of the development consent procedure at any time.“ However, it is not compulsory to apply for this formal procedure and the applicant can apply for the continuation of the procedure.

administrative act by the appeal or in court. Despite abolishment of special tribunals within the above mentioned reform, there is still important role of the special institute of *Volksanwaltschaft* (out of administration and out of court ADR). This “board of mediators” or ombudsman is granted by the Constitution (following the Scandinavian model).

4.7.2. Slovenia

The Slovene GAPA has not introduced any specific ADR mechanisms since its adoption in 1999. Parties cannot settle with public bodies, as the latter are obliged to protect the public interest. However, one can trace ADR in indirect sense, as regulated by:

1. settlement between contradicting parties within procedure (Art. 137 of the GAPA; details in: Androjna and Kerševan, 2006: 295);
2. modification of the decision upon appeal (Art. 242 of the GAPA);³⁷
3. modification of a decision upon a court action (Art. 237 of the GAPA; the ADA);
4. the discontinued execution under Art. 293 of the GAPA, when an execution procedure was initiated on the proposal of the entitled party but the latter has withdrawn;
5. the waiver of the right to appeal under the GAPA (since January 2008; Art. 224a), as it results in immediate finality and enforceability of the administrative act (Kovač, 2010: 743–769).

In addition, there are forms of mediation and settlement by sector-specific laws (in education, health care, environment, etc.). These settlements are of substantive rather than procedural character. Moreover, the ADA stipulates that parties to administrative dispute may settle any time before the case is adjudicated (Art. 57³⁸ in relation with Art. 45).

Mediation is regulated by the Mediation in Civil and Commercial Matters Act (OG no. 56/08). According to this Law (Art. 3), mediation is a process in

37 Data show that administrative appeal with possible modification of decision highly affects the celerity of dispute resolutions. This impact is positive. For example, in proceedings on income tax collection (approximately 1.3 million cases annually) in over 70% of cases when an appeal is lodged tax administration modifies its decision – resulting in resolution of disputes by the first instance authority (Dragos and Neamtu, 2014: 381). It seems that in this field new (i.e. replacement) administrative act has become a regular institution of dispute solving. In other fields this proportion is lower. General administrative units conduct approximately 1 million proceedings annually, while approximately 5% of appealed decisions are modified. In that manner, disputes have been resolved by mutual consensus between the first instance body and parties. The same quantity (approximately 5%) is revealed by statistical analysis in the other fields, such as social insurance rights.

38 ADA, Art. 57: „Parties in an administrative dispute may also end it with a settlement until a judgment is made“. However, the ADA (Art. 22) is referring to the Civil Procedure Act.

which parties, helped by a neutral third person (mediator) voluntarily try to amicably resolve a dispute relating to a certain contractual or other legal relation but not in administrative matters. Further, there is also the Act on Alternative Dispute Resolution in Judicial Matters (2009), again applicable to civil relations only.

Pursuant to administrative sector-specific laws, there are some special forms of mediation. One such option is regulated by the Patient Rights Act (2008) which defines mediation as one of the possible procedures for resolving a dispute between the patient and the health services before the judicial proceedings, and lays down certain rules of the mediation process. Further, the Marriage and Family Relations Act (1976) enables the centres for social work to help to reach an agreement on the custody of children and connected issues (negotiation, mediation), on the conclusion of the foster care contract, and regarding the use of parental leave (settlement). The Consumer Protection Act (since amendments in 2015) allows mediation and arbitration when the Market Inspectorate has initiated procedure in administrative framework, but settlement can be signed between consumer and seller only. There are also some semi- or “soft” settlements, such as in the Tax Procedure Act (2007; cancellation, postponement and instalment payment of tax). Pursuant to the Inspection Act (2002) an inspector can conclude the proceeding if the liable party has immediately rectified an infringement of the law.

The Human Rights Ombudsman and the Information Commissioner have the role in ADR, for instance in environmental and social fields (Dragos and Neamtu, 2014: 385).

4.7.3. Croatia

The Croatian GAPA of 2009 provides for administrative contracts. It also introduces the complaint (*prigovor*) as a remedy in provision of public services and other administrative activities. Administrative contract has been regulated too strictly (Art. 150–154). There have been no data on administrative agreements so far. Data on complaints reveal that this remedy is applied rarely (in 14 cases in 2013 and 2014). In the context of ADR, guarantee act is an important novelty (Art. 103) since it fosters legal certainty and reduces disputes. Again, its implementation depends on special laws (more in: Koprić and Đulabić, 2009; Koprić and Nikšić, 2010; Auby, 2014: 108–122).

The GAPA regulates settlement, which is limited to reconciliation of private interests between parties (Art. 57). It allows modifications of administrative

acts in the appellate phase of the procedure (Art. 115 et seq.). Moreover, the first instance body shall replace the contested administrative act with a new one if it does not interfere with the rights of third parties, provided that the appeal is upheld (Art. 113). There are additional competences of the second instance bodies intended to speed up procedure.

ADR is allowed in administrative disputes, with very limited autonomy of the sued public law bodies (e.g. cases of ECtHR, *Rajak v. Croatia*, 28.6.2001, *Horvat v. Croatia*, 26.7.2001). The Administrative Dispute Act of 2010 broadens the matter of the administrative dispute and ensures legal protection in every administrative procedure (Art. 3).

With regard to the Ombudsman, the Croatian situation is similar to Slovenian. He/she is authorized to protect human rights informally, by issuing recommendations to public law bodies. The Ombudsman is not allowed to act as a mediator in administrative matters.

4.8. Conclusions and Recommendations

Good governance is characterized by, among other things, the alternative or amicable dispute resolution (ADR). ADR methods are supposed to be systemically used in different relations between public law bodies and citizens. This is expected to contribute to more efficient and responsive governance. Given the social environment and regional culture, it comes as no surprise that ADR methods have been developed and continue to be more widespread in the Anglo-Saxon world, and in Japan, China, etc. For similar reasons, ADR is more developed in some legal fields than in others (e.g. civil, commercial, labour, and family disputes, environmental matters, construction, urban planning, social welfare, and taxation). The most prominent form of ADR is mediation. One must distinguish mediation as a procedural approach and settlement between parties to a procedure as a merit-based, substantive decision (Dragos and Neamtu, 2014).

In 2001, the Council of Europe adopted Recommendation Rec (2001)9 (the CoE Recommendation),³⁹ encouraging member states to start using ADR in administrative matters, even to the point of a mandatory mediation procedure

39 Recommendation Rec(2001) 9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties, adopted on 5 September 2001 at the 762th Meeting of the Ministers' Deputies. There the following forms are recommended:

(1) Preventive procedures aimed at avoiding litigation, i.e. public consultations, negotiations;

as a procedural condition. It may be concluded from the Council of Europe documents that alternative dispute resolution is promoted within private law with the goal of attaining a solution acceptable to all the parties involved in a dispute. In public law, ADR seems to be intended to tackle the case overload, with a goal of eliminating backlogs (the CoE Recommendation, points 4 and 5).

Administrative matters primarily entail the determination of public law relations between the authorities and citizens, where protection of the public interest has precedence. A settlement is possible, both under the GAPA and in special administrative procedures, if the contested issue is an agreement between private parties with opposing interests, or reduction or cancellation of a public law obligation for the purposes of increased efficiency of the system of power at large, facilitation of the economy, and social welfare. Although the administrative procedure differs in its substance from the civil procedure (Kovač, 2010: 745, etc.), it is being supplemented with possibilities of mediation in the sense of procedural clarification if not harmonisation of interests – similar to litigation institutes already established in the GAPA, such as finality, adversarial principle, and waiving of the right to appeal.

Almost all the countries in this study have adopted only a general law on mediation, inapplicable in public administration. However, there are certain sectors, regulated by special laws, such as public-private partnerships, where contractual relations are already in place and in which mediation may be applied. Some initiatives are more developed in Austria but for one field (i.e. environment protection). Due to the prevailing public interest and limited autonomy of public law bodies, countries acknowledge ADR in GAPAs and administrative disputes only between private (opposing) parties.

Limitations are also clear from the CoE Recommendation (points 10–12), as this document mainly refers to the administrative dispute, and less to other proceedings related to administrative matters. The CoE itself stresses that using ADR in relations between an administrative authority and a private party it is legality that must be considered, i.e. disputes may only be resolved within the applicable legislation. Mediation, or ADR, is thus only a supplement to the administrative and judicial systems, and not the basic or exclusive form of rights protection. This is the fundamental principle of conceptual integration of ADR. The countries in the Region would be well advised to include a provision within their GAPAs which would open a possibility for sectoral laws to facilitate ADR.

(2) Out-of-court procedures, i.e. internal administrative control, conciliation, mediation, settlement, ombudsman;

(3) Alternative court procedures, i.e. tribunals in Anglo-Saxon systems, and arbitrations.

Almost none of the GAPAs in the Region recognize ADR and its operational forms as a concept. Although some new procedural concepts, intending to be more informal, participative, and efficient, are being introduced, the countries have not introduced mediation and similar options in their GAPAs yet. On the other hand, several traditionally developed institutes can be seen as indirect ADR approach. They regulate settlement between private parties. Administrative contracts and new, more effective remedies such as the complaint against public services providers are being introduced. Traditionally, there is settlement between private parties and possibilities for modification of the administrative act by using legal remedies and *ex officio* interventions. In some countries, Ombudsman is recognised as a mediator or has a potential for this function. However, all these options are rather limited, quite new, or underdeveloped. They are insufficient in comparison to European trends.

To follow the EU trends and principles, ADR and its concrete forms have to be developed in GAPAs as well. The Dutch GALA can be taken as a role model, pursuing procedural mediation (Dragos and Neamtu, 2014: 113, etc.). For example, it would be recommendable if the GAPA contained a provision stipulating: “Before making a decision on the complaint, the administrative body shall try to contact the party who lodged the complaint to explore the possibility of finding an amicable solution.” The next example is the Finnish GAPA of 2003, which explicitly focuses on encouraging good administration and access to justice. In substantive law, higher discretion should be given to administrative authorities and concrete forms of ADR allowed as long as there is a balance between the public and private interests.

Several countries in the Region have enabled the conclusion of administrative contract by their GAPAs, but legislative solutions are still underdeveloped. Judicial protection regarding administrative contracts is to be kept within administrative dispute, not transferred to civil courts as regulated in some countries, since litigation has other values and principles which are not suitable for administrative relations. Further, the present provisions in relation to specific laws seem to be too modest. There is room to design several rules by GAPA as a common minimum standard.

Complaint as the new legal remedy introduced by several GAPAs can be regarded as an ADR tool in the field of public services delivery.

Counties should consider defining in their respective GAPAs a general principle and obligation of the public law bodies to strive for mediation and settlement. Further, they are to develop mediation, arbitration, and other forms of ADR (a) generally in the GAPA and (b) elaborated by sector specific laws. Although informal in principle, the mediation process should

be at least minimally regulated by a general law – who may propose mediation, costs bearing, suspension effects, exclusivity or parallelism of different procedures, etc.

Further steps to recommend are the following:

- pursuant to GAPA, allow a substitute decision or its modification upon the appeal or other legal remedies lodged by a party;
- include administrative contracts into the GAPA where they are still not in place;
- introduce the complaint as a semi-devolutive legal remedy to resolve the conflict without administrative dispute;
- strengthen possibilities for ADR within administrative disputes;
- verify the role of Ombudsman as a mediator between public administration and citizens.

Parallel to these legally oriented measures it is of utmost importance to take care of the training of public servants and administrative judges in order for them to understand and foster ADR in practice.

Western Balkan countries are recommended to follow some of the key European documents, such as the Resolution of the European Parliament of January 2013 on the Law of Administrative Procedure of the EU, currently still in the drafting process and due for adoption in 2016, and the Model Rules published in September 2014 by ReNEUAL (Hofmann, Schneider and Ziller, 2014; Dragos and Neamtu, 2014; Auby, 2014), as an inspiration for designing their own laws. These sources can serve as an inspiration in particular with regard to ADR concepts.

5. FINAL CONCLUSIONS AND RECOMMENDATIONS

5.1. Country Specific Conclusions and Recommendations

5.1.1. Albania

Albania is the only Western Balkan country that has not had several decades of administrative procedures codification. Nevertheless, Albania bridged the regulative gap in the field rather quickly, following the role models of the most developed countries in the region and accepting the explicit assistance of Sigma, CARDS, and the Venice Commission. Therefore, Albania adopted its first law, the Code of Administrative Procedures (CAP), in 1999. This law had already taken into account a broad definition of scope, including all types of individual administrative acts, delivery of public services, and administrative contracts. The CAP of 1999 had several systemic deficiencies, some of which concerned effective legal protection of the parties and related legislation on administrative dispute. The implementation of the CAP cannot be assessed empirically because there is no data about its effects.

A new (shorter) CAP was adopted in May 2015. This law will enter into the force in 2016, a year after its publication. The new CAP of 2015 has introduced several novelties. Its principles are also applicable to the normative sub-legal acts. E-documents are equal in legal effects to classical ones. Further positive novelties include regulation of legal remedies, increased consistency of legal provisions, and improved position of the party in relations with public authorities. For instance, pursuant to the 1999 CAP, the definition of invalidity of an administrative act was not clear, and parties could file formal or informal request for an internal review, which led to confusion. The 2015 CAP has stipulated administrative appeal only, and introduced the institute of complaint into public services, as a remedy when no administrative act is issued. There are additional remedies and *ex officio* interventions: reopening

of proceedings (so-called revision), annulment or revocation, modification and abrogation. The authorities still have too many opportunities to intervene into valid administrative acts, but at least this law distinguishes remedies according to their effects for the parties (beneficiary or burdening).

Considering aforementioned issues, the main recommendations for Albania are mostly beyond regulative measures:

- Devote special attention to in-service training in public administration to disseminate fundamental principles of the new CAP. The focus should be on the attitude of civil servants towards private parties in order to enable the latter to exercise their rights as quickly as possible instead of overprotecting the public interest in terms of formalism. The training should be centralised and as widely implemented as possible. The content and methods are to be practice based – to indicate how the modern state and authorities respect the *ratio* of the CAP and its principles in concrete cases and procedural issues as opposed to (post)communist approach.
- On these grounds, a comparative analysis of specific sector-related laws with procedural provisions and their harmonisation to the (principles of) new CAP is to follow. According to available information, the methodology has already been worked out, so the analysis is to be prepared in early 2016 and special laws amended accordingly.
- It is of major importance to establish a reliable database on reviewing implementation of the CAP and results of administrative disputes. Only empirically based changes of legislation can lead to progress.
- It is recommended to conduct the above-mentioned activities and collect at least partial data before the new CAP enters into force to correct potential inconsistencies between the aims and practice, namely to amend special laws to comply to fundamental values and operational novelties of the new Law.
- Effective administrative judiciary within administrative courts has yet to be developed, with special attention devoted to speedy proceedings with merit-based judgments.

Recommendations regarding the provision on legal remedies in the CAP:

- The usual path of protection of the parties to the procedure by filing an appeal and through administrative dispute in front of the court should be regulated more consistently. However, other remedies are to be more limited. The reasons for applying them have to be explained explicitly, only more important errors can be recognised as grounds for initiating remedy proceedings, there should be shorter deadlines and decreased legitimacy to act officially.

- Some remedies or grounds upon which an authority may act seem too broad and could be limited to present abrogation grounds. In the same sense, the provisions on invalidity of an act *ex lege* do not seem clear enough, so it is suggested that in such a case the respective act be derogated explicitly, upon a party’s motion.
- To speed up the proceedings, deadlines for administrative silence ought to be shortened. Contrary to that, the party has to have enough time to lodge an appeal.
- To introduce mechanisms for effective ADR (for instance, to regulate settlement and enhance administrative act replacement even partly in application of legal remedies if no public interest is endangered).

5.1.2. Bosnia and Herzegovina

Due to the complex state organization of Bosnia and Herzegovina, four laws on general administrative procedure are in force. Although adopted at the end of the 1990s (in FBiH) or at the beginning of 2000s, all of them follow the structure and content of the previous Yugoslav GAPA. In practice, many institutes (especially so-called extraordinary legal remedies) are not implemented or respected (such as the deadlines for issuing administrative decisions). In spite of (too) many provisions regulating general administrative procedure, the regulation of new institutes such as administrative contracts, the relationship between the customers and providers of public services, etc. is lacking. Accordingly, the regulation of administrative procedures is too formalized, detailed and not in full conformity with the needs of contemporary public administration, European standards, and orientation towards citizens.

The main recommendation is to introduce completely new and harmonized law(s) on general administrative procedure with the following features:

- Clear indication (in the titles of new laws) of the general nature of provisions regulated by the new laws;
- The law(s) based on the idea of stronger protection of the rights and legal interests of citizens and other societal subjects;
- Abandonment of obsolete and wrongly conceptualized institutes (especially extraordinary “legal remedies”) and overall simplification of administrative procedures;
- Regulation of new institutes (administrative contracts, services of general interest, new types of legal remedies, i.e. the complaint, administrative actions) in accordance with the requirements of contemporary societal needs;

- Clear responsibilities of the bodies included in overall administrative procedure (e.g. the obligation of the second instance body to decide on merits) in order to prevent long proceedings;
- Optimal number of cases explicitly opened for regulation by special laws in order to reduce unnecessary legal complexity and confusion;
- Enabling procedural efficiency and usage of modern ICT in administrative procedures;
- Harmonization with European terminology and standards as well as with the case law of the European Court of Human Rights.

Considering the aforementioned recommendations related to regulation of general administrative procedures, further changes following the adoption of the new systems of administrative procedure are required:

- To review and harmonize special procedural laws with new GAPAs, and to reduce the number of special procedures to the level that guarantees the required scope of transparency and predictability in administrative proceedings and decision-making;
- To harmonize the administrative justice system with new GAPAs and European standards, especially regarding the right to judicial review of administrative acts and other decisions made by the public law bodies (even in the cases when an appeal is stipulated in the administrative procedure!) and the right to appeal against the court decision passed in first instance procedure;
- To consider the possibility of institutional reorganization of the administrative justice system, e.g. establishment of special administrative courts;
- To organize and implement in-service training for all civil servants engaged in administrative procedures;
- To prepare and implement a wide public campaign in order to raise citizens' awareness of their rights and duties in relation to public bodies provided by new GAPAs;
- To conduct efficient monitoring over the implementation of the LGAP based on the previously prepared methodology for monitoring and reliable databases on the conducted administrative procedures.

5.1.3. Kosovo*

Kosovo* shows good prospects to adopt a new, modern Law on General Administrative Procedures soon. The Law has been prepared by the OECD-Sigma experts, including the experts from the Western Balkans, which guarantees that the new piece of legislation is in line with European standards and well-grounded in the country-specific circumstances and needs.

However, it has to be noted that the main challenges to the new law will continue to be implementation of the law and building administrative capacity that should support the proper implementation of the new institutes.

The main recommendations for the period after adoption of the new Law are:

- Harmonisation of special laws. It is necessary to review and harmonize special administrative procedures with the new Law in a short period. That would create the circumstances in which the new Law will remain a truly general law that can be applied across various administrative fields.
- In-service training programmes. For quality implementation of the new Law it is vital to prepare and conduct high quality in-service training programmes. Such a massive in-service training should serve as a tool for strengthening the administrative capacities at all governmental levels (central government, local self-government, public institutions and agencies, etc.). It is absolutely necessary to train various layers of civil servants who will be the main implementing vehicles of the new institutes and rationale of the new Law.
- Development and wide dissemination of tools for training and implementation. The preparation of different commentaries and other written training materials for educational purposes is closely connected with the previous recommendation. These training tools should be used for official training programmes as well as for informal training of civil servants who will implement the new Law.
- Development of proper academic education. It is highly recommendable to develop and adopt curricula at the universities teaching administrative law in order to reflect new trends in regulation of administrative procedures. This is particularly important for some new legal institutes such as administrative simplification, integrated administrative services (*one-stop shop*), administrative contract, new system of legal remedies, use of modern technologies in administrative procedure, etc.
- Campaign to raise citizen awareness. It is necessary to raise citizens' awareness of the new Law and all the benefits it brings to citizens. The implementation of many new institutes depends, among other things, upon citizens' knowledge and use of these novelties. This recommendation can be developed and realised in cooperation with NGOs and other non-governmental actors. Local and national media could play important role in this process.
- Adjustment of the administrative justice system. For correct implementation of the new Law, the administrative justice system serves as a natural continuation of administrative procedure. Having in mind the widened legal protection of citizens and other subjects (services of general interest, administrative contracts, and

administrative actions), it is necessary to enable legal protection of the parties and their interests in front of the competent and efficient administrative court. Otherwise, there is a real danger that the new Law will not produce desired positive effects.

5.1.4. Macedonia

The first Macedonian Law on General Administrative Procedures was adopted in 2005 and amended in 2008 and 2011. In general, it was too detailed, containing more than 300 articles. Lessons learned from this Law joined with the modernized system of administrative justice prompted the preparation of a completely new law in 2013, with expert support of the OECD-Sigma. An OECD-Sigma expert team consisted of domestic experts and international experts from the Western Balkans and the European Union. The Draft was finally adopted in 2015, following thorough preparation and public, political and expert debates. Its implementation will start in 2016, after a year of *vacatio legis*. The Law follows the modernization pattern already applied in Croatia, Montenegro, and some other countries. Adoption of new institutes, such as the complaint and administrative contract, and general introduction of European standards substantively widen legal protection of citizens. Regulation of e-communication, introduction of clear deadlines for deciding in administrative matters and clear obligations of the bodies acting in administrative proceedings, as well as the simplification and abandonment of the obsolete institutes (especially certain types of extraordinary “legal remedies”) should speed up the proceedings and make them more efficient. However, the institutions established in 2011 in order to ensure the right to appeal in administrative procedure and administrative dispute (the State Second-Instance Commission for Decision-Making in Administrative Procedures and Labour Relations Procedures, and the High Administrative Court) are neither completely functional nor effective, and the appeal procedure remains too onerous after the adoption of the new LGAP.

The main recommendations are:

- To review and harmonize special administrative procedures with the new Law as soon as possible;
- To prepare and implement massive educational activities in order to strengthen administrative capacities at all governmental levels as well as to raise the awareness of public administration on the rights of the parties;
- To organize and conduct a public campaign in order to raise citizens’ awareness;

- To facilitate the procedure of the conclusion of administrative contracts, i.e. to make their usage possible in the cases not stipulated by special legislation;
- To simplify and speed up administrative proceedings by using the possibilities of electronic communication;
- To ensure timely and efficient legal protection of the parties in the second instance administrative procedure;
- To adjust the administrative justice system, having in mind widened legal protection of citizens and other subjects (services of general interest, administrative contracts, and administrative actions);
- To ensure more efficiency in the enforcement of administrative courts' rulings;
- To conduct efficient monitoring over the implementation of the LGAP based on the previously prepared methodology for monitoring and a reliable database of administrative procedures, filed legal remedies, and the results of administrative disputes.

5.1.5. Montenegro

Montenegro has invested a considerable amount of time and energy in the preparation of its new, rather modern general administrative procedural law. It has employed a fruitful combination of international expert assistance provided by the OECD-Sigma and domestic expertise. Montenegro has insisted on having international experts familiar with not only the EU *acquis communautaire*, European standards, and comparative situation of regulating general administrative procedures, but also with the old Yugoslav Law and previous modernization attempts in other Western Balkan countries. In the final stage, the Draft was prepared by domestic high expert group and only one OECD-Sigma expert from the WB region. Moreover, the Ministry of Internal Affairs insisted on public presentations, discussions with academia and domestic expert community, expert presentations to the Parliament and other interested state bodies, other public bodies, and municipalities. Montenegro is making a determined effort to prepare the implementation of the new Law, which has been delayed until 1 July 2016. All this can be seen as a good example of the preparation of a modern general administrative procedural law.

The main recommendations are:

- Draft Law on Administrative Disputes and Draft Law on Administrative Inspection have to be prepared and adopted as soon as possible. It would be advisable for them to enter into force on 1 July 2016, i.e. on the same day as the new Law on Administrative Procedures.

- The complete harmonisation of special procedures with the new Law on Administrative Procedure has to be achieved by 1 January 2016. Civil servants who will prepare necessary legislative changes of special laws have to be trained. A new system of co-ordination between the Ministry of Internal Affairs and all the other ministries that will be included in the harmonisation process has to be designed in advance.
- In-service training has to be organised for a wide circle of civil servants throughout public administration, including those in the state administration, local governments, agencies, public institutions and other subjects vested with public competences.
- To consider facilitating the procedure of the conclusion of administrative contracts, i.e. to make their usage possible also in the cases not stipulated by special legislation.

5.1.6. Serbia

The process of LGAP reform and modernisation in Serbia lasted longer than in the other WB countries. This is mostly due to changing the basic attitude towards the reform. After the first Draft under the auspices of SIGMA backed by the EU, there were several new drafts that slowed down the whole process, shifting it backwards. The end result was that the Serbian National Assembly (Parliament) adopted the new Law on February 29, 2016.

The present Law is a rather long and detailed piece of legislation in comparison with other general administrative procedure laws in the Region, despite the fact that it regulates more or less same legal institutes as the other GAP laws in the Region.

It follows the structure and the spirit of the previous Serbian LGAP which stemmed from the former Yugoslav LGAP. However, it has finally incorporated certain important novelties and has moderate modernization potential. It remains questionable whether this LGAP can serve as a public administration modernisation tool especially when it comes to the implementation of the new institutes. This is mainly predetermined by legal regulation that does not enable the implementation of new institutes, particularly administrative contracts.

The main recommendations are:

- Better regulation of the new institutes in the future. They should be better regulated based on the experiences of other countries (e.g. Croatia) that have not regulated these institutes in a satisfactory manner, which is one of the main reasons for their inadequate

implementation. The revision should be done having in mind the development of GAP regulation at the level of EU institutions in recent years that should and could serve as a good role model. Good experience of other countries in the Region (e.g. Montenegro) should also be taken into account.

- Capacity building. The capacity of central state administration as well as local government and the administrative justice system ought to be strengthened in order to implement the new concepts of administrative procedure. Brochures explaining the main novelties should be printed and distributed among civil servants, citizens, and entrepreneurs who are in daily contact with public administration bodies.
- Training system. There ought to exist a system of comprehensive training of civil servants at all levels of government for understanding and implementing the new law, so the existing administrative culture can be changed to service oriented towards citizens.
- Revision of special laws. Special laws containing procedural norms have to be assessed and revised in order to eliminate overlapping and remove any unnecessary procedural norms.
- Enabling implementation of new institutes. Make sure that the new institutes of the LGAP whose implementation depends upon regulation of special laws are really implemented in due time. This process should be closely connected with the previous recommendation.

5.2. Overall Conclusions and Recommendations

5.2.1. Complex Goals of Administrative Procedure Reforms

There is at least three-fold purpose to administrative procedures. Firstly, administrative procedures influence the realisation of human rights and determine the level of legal protection of citizens' rights. Secondly, they can contribute to the realisation of certain wider societal values, such as the rule of law, legality, curbing corruption, raising the level of transparency in public administration, etc. Last but not least, administrative procedures are a substantial part of administrative technology responsible, to a large extent, for (in)efficiency of public administration – too complex, too detailed, and inappropriate legal regulation of administrative procedures that imitates formal and complex court procedures can significantly add to public administration's

inefficiency, irritating formalism, and “bureaucratisation”. Because of that, the main goals of LGAP reform in the Region are:

- a) Strengthening the legal position of citizens, legal persons and entrepreneurs in line with the European legal standards and national constitutional law;
- b) Simplification and acceleration of administrative procedures;
- c) Enhancing administrative capacities for effective implementation of domestic legislation and EU *acquis communautaire*;
- d) Reducing the complexity of the old LGAP, in order to make its implementation more efficient and accurate.

5.2.2. Continuous Task of Modernization of Administrative Procedures

The modernisation of general administrative procedures, by preparing and adopting new laws on general administrative procedure, is a common activity in the Region. It is also a never-ending activity. Some countries adopted new general administrative procedure acts at the end of the 1990s (FR Yugoslavia in 1997, Federation of Bosnia and Herzegovina in 1998, Albania in 1999). They were followed by Bosnia and Herzegovina (at the state level) and the Republic Srpska (2002), Montenegro (2003), and Macedonia (2005). Kosovo* adopted its law on general administrative procedures in 2007, followed by Croatia, which adopted its new, modernized General Administrative Procedure Act in 2009. Then, the new laws on administrative procedures were adopted in Montenegro (2014), Albania (2015), Macedonia (2015), and Serbia (2016). A new law is being drafted in Kosovo*, and there are certain announcements of administrative procedural reform in Bosnia and Herzegovina, too.

5.2.3. Europeanization as the Main Reform Trigger

The Europeanization of public administrations and particularly Europeanization of the system of legal protection of citizens are the most important motives for deep GAPA changes in the Western Balkans. Europeanization of administrative procedures is fostered by the standards of the Convention for the Protection of Human Rights and Fundamental Freedoms, and is based on the right to good administration from the Charter of Fundamental Rights of the European Union. However, many other European legal documents serve

as the source of inspiration for domestic legal and institutional changes. European standards as well as the case law of the European courts also play a very important role.

European citizens and entrepreneurs, including those in accessing countries, expect equal or similar level and quality of public services throughout Europe. It is important for life quality and necessary for normal business activity. Emerging European Administrative Space is a precondition for realization of the EU's four freedoms. In such a framework, Western Balkan countries try to harmonize with the EU *acquis communautaire* and other European standards. GAPA as one of the main legal tool for fostering changes in administrative technology and for reforming public administration are under reconstruction in almost all countries in the region. Widening legal protection in line with the standards of European conventions and regulations, case law of European courts and soft law developing under the influence of various European actors is one direction of changing GAPAs in the region. The other one is reduction of formalities, enabling and developing e-government solution, reducing administrative burden and striving for maximum administrative efficiency under the general framework of the rule of law. Many of the new drafts GAPA in the region have been prepared with the support of the OECD-Sigma, under conditionality policy of EU.

Administrative procedures are but one of the elements of the whole system of protection of citizens' rights. Administrative justice is another important element. Administrative procedures and administrative justice have to be thoroughly coordinated and interconnected, in order to ensure quality legal protection. Domestic administrative decisions are under scrutiny of the European courts, first of all of the European Court of Human Rights. Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe with additional protocols and case law developed by the ECHR serves as one of cornerstones for building new, modernized system of legal protection. Having also in mind recent developments of the right to good administration, including entering into force of the Charter of Fundamental Rights of the European Union and the preparation of the European Law of Administrative Procedure (European Parliament's Resolution 2012/2024-INL), together with the European Code of Good Administrative Behaviour adopted in 2001 by the European Parliament, all countries in the Region have to invest heavy efforts to acquire developing European legal standards and to follow administrative and legal development within EU and its Member States.

5.2.4. Need for Modernization

Administrative procedural law should be modernized, to be in line with the changes in society and new expectations of citizens, businesses, investors, international actors, and other subjects. Heavy, detailed, casuistic, and formalistic regulation of the general administrative procedure does not have the same impact as the more modern regulation focused on wide principles and the most important issues of protection of citizens' rights. While the former can cause red tape and non-transparent situation in the public sector, the latter can streamline both procedures and administrative control to impacts of administrative procedures. Administrative procedures should be modernised, if they are to produce desirable results.

5.2.5. Prerequisites for Successful Implementation

There are prerequisites for successful implementation of the new laws on general administrative procedures, which have to be taken into account in contemporary societies:

- a) Information sharing and strong public relations;
- b) Proper and intensive training of all civil servants;
- c) Changes in administrative law education;
- d) Court acceptance of the new administrative procedural philosophy (spirit, not only script of the new laws);
- e) Strong and continuous political demands for administrative simplification and faster procedures.

5.2.6. Obstacles

- a) Relatively low level of administrative procedural education;
- b) General public ignorance of the new law;
- c) Resistance and unwillingness of high civil servants to implement script and spirit of the new laws (to propose, for example, reduction in the number of special procedures or establishment of one-stop-shops, etc.);
- d) Political negligence with regard to the new laws on general administrative procedure;
- e) Bureaucratic administrative culture.

5.2.7. A Brief Comparative Overview

Special procedural laws are important in the whole Region. Laws on general administrative procedure are subsidiary laws that apply in situations where special administrative procedural rules do not exist. Special procedures are important from two aspects. First, they often regulate procedural issues differently from the LGAP and this creates a sort of 'procedural chaos' that diminishes the principles of the rule of law and good governance. Second, the implementation of new institutes regulated by the LGAP depends upon adoption of the special laws that regulate them in more detail. As a rule, these special laws rarely regulate new institutes and that is the reason why such institutes are not applied. Probably the best example of such behaviour is the regulation of administrative contract, implementation of which is dependent upon explicit permission of special regulation.

Although most countries in the Region have regulated several new institutes in their LGAPs, this regulation has been reduced to only few articles per new institute. One would have thought that the new institutes, such as the administrative contract, one-stop shop, electronic communication, to mention but a few, would be regulated in more detail, while the "old" well-known institutes that have become part of the institutional heritage would deserve lighter regulation. This approach will probably undermine the reform potential of these new legal institutes in the future.

Administrative capacity for effective implementation of the new LGAPs remains a challenge in most countries in the Region. While in newly recognised countries (e.g. Kosovo*) administrative capacity has to be built up practically from scratch, in other countries that have inherited a strong tradition of the former Yugoslav administrative procedure, the capacity for mentality change ought to be developed.

5.2.8. Lessons Learned

- a) It is not easy to change a law, but the real challenge is to change the administrative mentality, inertia, and bureaucratic resistance during the implementation phase.
- b) Having that in mind, one should try to create an implementable law, which is neither a law full of good wishes nor a law without any wishes at all.
- c) The old Yugoslav law as well as all its derivations in the WB region were good laws, but they are unsuitable for today's world. New

challenges have to be taken into account when preparing and drafting the new, more Europeanized and modernized GAPA.

- d) Only strong and continuous political support and attention can result in successful reforms of administrative law and public administration.
- e) The competent public body (a ministry) should invest continuous efforts in all phases of the new legislation, from preparation, through drafting, to implementation phase. No one and nothing can replace this body, its enthusiasm, and devotion.
- f) Academia has a significant role in the promotion of new ideas and the new system of administrative procedural rules – the real beginning of young civil servants' careers happens at universities; university teachers could be the real promoters of administrative modernization. Good and intensive cooperation with universities should not be neglected.

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